TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~433~~. 134.

ERIE RAILROAD COMPANY, PETITIONER,

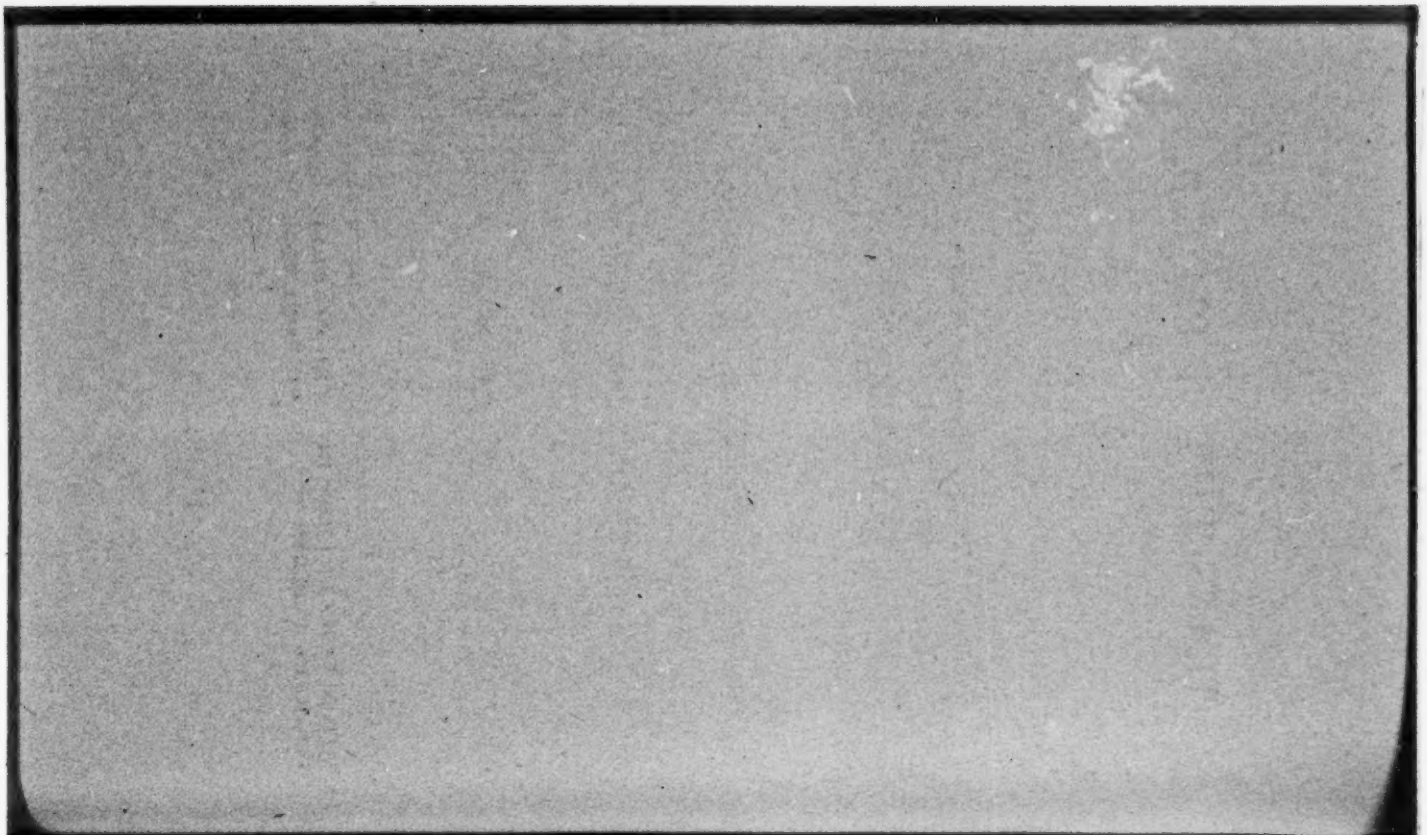
vs.

ERIE AND WESTERN TRANSPORTATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 16, 1905.
CERTIORARI AND RETURN FILED NOVEMBER 17, 1905.

(19,935.)



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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1904.

No. 1137.

ERIE & WESTERN TRANSPORTATION COMPANY,
Appellant,

vs.

ERIE RAILROAD COMPANY,
Appellee.

MR. HARVEY D. GOULDER,
Counsel for Appellant.

MR. CHARLES E. KREMER,
MR. W. O. JOHNSON,
Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois.

Pleas had at a regular term of the District Court of the United States for the Northern Division of the Northern District of Illinois begun and held at the Unites States Court Rooms in the City of Chicago in said Division of said District on the First Monday of July (it being the fourth day thereof) in the year of our Lord One Thousand Nine Hundred and Four and of the Independence of the United States the One Hundred Twenty-eighth year.

The Honorable Christian C. Kohlsaat, Judge, being absent, John C. Ames, United States Marshal being absent,

In pursuance with the order of the Court of date July 2, 1904, T. C. MacMillan, Clerk, by his Deputy Chas. A. Buell, being now here present, adjourns said Court until Wednesday, July 6, A. D. 1904, at ten o'clock A. M.

6. Be it remembered that heretofore, to wit, on the 6th day of
2 February, A. D. 1904, there was filed in the Clerk's Office of said Court, a Libel of the Erie Railroad Company vs. Propeller "Conemaugh" in Admiralty, No. 9576, said libel being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Northern Division.

In Admiralty.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

The libel of the Erie Railroad Company, New York, against the propeller "Conemaugh", her engines, boilers, boats, tackle, apparel and furniture, alleges as follows:

1st: That at the different times mentioned in the libel the libelant was a corporation duly organized under the laws of the State of New York.

2nd: That at the time of the collision hereinafter mentioned the Union Steamboat Company was a corporation organized under the laws of the State of New York, with its principal office at Upper Nyack, Rockland County, New York, and at the time of the said collision, and for a long time thereafter, was the sole owner of the Propeller "New York," hereinafter mentioned.

3rd: That on the 30th day of June, 1896, the libelant owned all of the capital stock of the Union Steamboat Company, and on the said day, under the laws of New York, known as Chapter 935 of the laws of 1896, merged the said Union Steamboat Company in and with the libellant, and that by virtue of the said merger the libellant acquired and became possessed of all the estate, property, rights, privileges and franchises of such corporation
3 in substantially the same manner as the same were held by the said Union Steamboat Company, and that by virtue of the said merger and consolidation of the said Union Steamboat Company with the libelant, the latter became entitled to collect and claim all debts and claims due to the said Union Steamboat Company from any person or party, and therefore, became and was and is entitled to the various sums of money to be recovered by it in this suit.

4th: That at the different times hereinafter mentioned the said Propellers "New York" and "Conemaugh" were steam ves-

sels of more than twenty tons burthen, enrolled and licensed for the coasting trade, and employed in commerce and navigation upon the Great Lakes.

5th: That on or about the 21st day of October, 1891, a collision occurred on the waters of the Detroit River between the said Propellers "New York" and "Conemaugh," which resulted in the sinking of the "Conemaugh."

6th: That on the 11th day of November, 1891, the Erie & Western Transportation Company, as owner of the said Propeller "Conemaugh," and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the aggregate sum of $70,000 for damages sustained by the Propeller "Conemaugh" and her cargo by reason of said collision.

7th: That thereafter the Union Steamboat Company, as the owner of the Propeller "New York," filed its answer to said libel, denying all liability for the said collision, and the damage resulting therefrom, and alleging that the said collision was due solely
4 to the fault of the Propeller "Conemaugh," and that the damages suffered by the "New York," arising out of the said collision, amounted to the sum of $3000.00.

8th: That thereupon a trial was had in the District Court of the United States for the Eastern District of Michigan, and the Court held that both the Propellers were at fault for the collision, as will more fully appear from a decision of the case entitled The "New York," 53 Federal Reporter, 553.

9th: That thereupon a rehearing was asked for on behalf of the Erie & W. Trans Company, and the District Court reversed its former decision and held the Propeller "New York" solely at fault for the collision.

10th: That thereupon the following Insurance Companies filed their petitions and intervened in the said cause, claiming damages to the cargo of the "Conemaugh," which they had insured in the following amounts:

British & Foreign Marine Insurance Company, Limited	$2421.84
Insurance Company of North America	7950.09
Union Marine Insurance Company	8553.06
Marine Insurance Company	916.57

11th: To all of the petitions of the above intervenors the Union Steamboat Company filed its answer, denying all liability for the collision, and alleging that the fault of the same rested solely upon the "Conemaugh."

12th: That on the 25th day of January, 1895, a stipulation was made between the proctors for the Union Steamboat Company and intervenors on the one side, and the proctors for the claimant and cross libelant on the other, being all of the parties interested in said cause, in which it was agreed that the damages sustained by the owner of the Propeller "New York," on account of the said collision, amounted to the sum of $3391.19.

13th: That subsequently a decree was entered in favor of libellant, the Erie & Western Transportation Company, for all of the damages sustained by the Erie & Western Transportation
5 Company as owner of the "Conemaugh," and also as the bailee of her cargo and there was also included decrees for the damage sustained by the respective Insurance Companies which had intervened in the said cause.

14th: That upon the hearing of the said cause in the Circuit Court of Appeals for the Sixth Circuit, to which the same had been removed by appeal, the latter Court reversed the decision of the District Court and found the Propeller "Conemaugh" solely at fault for the collision and decreed that the Union Steamboat Company was entitled to recover damages sustained by the Propeller "New York." For a full text of the decision in the said cause reference is hereby had to the cause of The "New York," 82 Federal Reporter, 819.

15th: A petition for a rehearing was filed in the said cause, but was denied by the said Circuit Court of Appeals for the Sixth Circuit, and for a full text of the decision reference is had to the case of The "New York," 82 Federal Reporter, 814.

16th: That thereupon the Erie & Western Transportation Company filed its petition in the Supreme Court of the United States for a writ of certiorari in the said cause, directed to the Circuit Court of Appeals for the Sixth Circuit, which writ the Court granted and the case was removed to the Supreme Court of the United States and there heard and decided, the Court finding both the Propeller "Conemaugh" and the Propeller "New York" at fault for the collision, and that the damages be divided. For the full text of this decision see the case of the "New York," 176 U. S. 187.

6 17th: That thereupon the Supreme Court of the United States, on the 22nd day of January, 1900, issued its mandate in the words and figures following, to wit:

"UNITED STATES OF AMERICA, } ss.:

To the President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Eastern District of Michigan,

Whereas lately in the United States Circuit Court of Appeals for the Sixth Circuit, in a cause between the Union Steamboat Company, claimant of the Propeller "New York," appellant, and the Erie & Western Transportation Company, libellant, and the British & Foreign Insurance Company, Limited; Insurance Company of North America, The Union Marine Insurance Company, and the Marine Insurance Company, Limited, intervening petitioners, appellees, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 5th day of October, A. D. 1897, is in the following words: "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

'On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same hereby is reversed with costs, and the cause is remanded to the Court whence it came, with directions to dismiss the libel of the owners of the "Conemaugh," and the petition of the intervening Insurance Companies, and to enter a decree in personam in favor of the owners of the New York against the owners of the Conemaugh for the agreed damages to the New York,' as by inspection of the transcript of the record of the
7 United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine the said cause come on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in the cause be and the same is hereby reversed, the claimants of the Conemaugh, and the claimant of the New York each to pay one half of all costs in this cause.

And that the said Erie & Western Transportation recover

against the Union Steamboat Company, $276.75 for one half of the cost herein expended and have execution therefor.

And it is further ordered, that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this Court, with interest from July 3rd, 1896, until paid, at the same rate per annum that decrees bear in the Courts of the State of Michigan.

Dec. 7th, 1899.

You therefore, are hereby commanded that such execution and proceedings be had in the said cause in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred.

8 JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States."

18th: That afterwards, and subsequent to the decision of the Supreme Court on the 17th day of March, 1900, the proctors representing the different parties interested in said litigation, entered into a stipulation which defined the amount of damages sustained by the different parties interested in the said cause, which stipulation is in the words and figures, following, to wit:

"THE DISTRICT COURT OF THE UNITED STATES,

For the Eastern District of Michigan.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, Libelant, The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors.*	In Admiralty.
vs.	
The Propeller "New York," The Union Steamboat Company, *Complainant.*	

It is hereby stated that the losses sustained by the parties to

this cause by the collision between the said Propellers Conemaugh and New York, with interest to July 3rd, 1896, shown by the record in said cause, are as follows:

Erie & Western Transportation Company, owners of Propeller Conemaugh	$30,508.46
Erie & Western Transportation Company, Trustee for underwriters on cargo, other than intervenors	19,627.67
British & Foreign Marine Insurance Company, Ltd.	2,421.84
The Insurance Company of North America.	7,950.09
The Union Marine Insurance Company.	8,553.06
The Marine Insurance Company, Limited	916.57
9 Union Steamboat Company, owners Propeller New York	4,341.80
Total losses.	74,319.49

HARVEY D. GOULDER,
Proctor for Libellant,
F. H. & G. L. CANFIELD,
Proctors for intervenors.
C. E. KREMER & WISNER & HARVEY,
Proctors for Claimant.

Dated March 17th, 1900."

19th: That thereupon on the 24th day of March, 1900, the District Court of the United States for the Eastern District of Michigan, in pursuance to the mandate of the Supreme Court, passed and entered the following decree.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Michigan.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, Libelant, The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; The Union Marine Insurance Company, Limited, *Intervenors*, vs. The Propeller New York, the Union Steamboat Company, *Claimant.*	In Admiralty.

On reading and filing the mandate of the Supreme Court in this cause, bearing date the 22nd day of January, in the year of our Lord one thousand nine hundred, and in obedience to said mandate and in consonance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said Propeller "Conemaugh," and the said Propeller New York, were both in fault for the collision set forth in the pleadings in this cause, and that the damages to said vessels and their owners resulting therefrom be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company;

And it is further ordered, adjudged and decreed that the underwriters and owners of the cargo of said Propeller Conemaugh recover the full amount of their damages against the Union Steamboat Company and the American Surety Company, of New York, its surety upon the bond or stipulation herein filed, with interest at the rate of seven per cent. per annum (that being the rate per annum that judgments and decrees bear in the courts of Michigan under the statute of said State), from the 3rd day of July, 1896, until paid.

And it appearing that the above named intervenors were insurers of portions of said cargo, and that they have suffered damages on account of said collision, as follows, to wit:

The British & Foreign Marine Insurance Company, Limited, in the sum of	$2421.84
The Union Marine Insurance Company, in the sum of	8553.06
The Marine Insurance Company, Limited, in the sum of	916.57
The Insurance Company of North America, in the sum of	7950.09

It is further ordered, adjudged and decreed that said intervenors severally recover from the said Union Steamboat Company and its surety their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of seven per cent. per annum from the 3rd day of July, A. D. 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into Court, or to the proctors for said intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have executions therefor.

And it further appearing that the owners of said cargo and their underwriters, other than the intervenors, have suffered damages by said collision in the sum of $19,627.67, for which the said Erie & Western Transportation Company appears in this suit as Trustee only, it is further ordered, adjudged and decreed that said Trustee recover from said Union Steamboat Company and its surety, in trust, for the said owners of and under writers on cargo, the aforesaid sum of $19,627.67 with interest thereon at the rate of seven per cent. per annum from July 3rd, 1896, until paid, and that it have execution therefor.

And it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company recover from the said Union Steamboat Company and its surety aforesaid, the sum of $13,083.33 (being one half of the damages to said Conemaugh, less one half of the damage suffered by said New York in said collision), together with interest thereon at the rate of seven per cent. per annum from July 3, 1896.

And it is also decreed that said libellant recover of said claimant and its surety, $276.75, as one half the costs of said cause in the Supreme Court, and also one half of all costs of said cause in this Court and in the United States Circuit Court of Appeals for the Sixth Circuit.

And it is further ordered that if default be made in payment of any of the said sums, executions issue therefor against the said claimant and its surety aforesaid.

HENRY D. SWAN,
District Judge."

20th: And thereupon a petition was filed by the Union Steamboat Company in the Supreme Court of the United States, praying for a writ of mandamus to issue to the Judge of the District Court of the United States to show cause why he did not obey the mandate of the Supreme Court, as hereinbefore set forth.

The petition being granted the Court had a hearing upon the same, and then denied the writ prayed for, which decision will be

6. found in the case of Ex parte Union Steamboat Company, 178 United States, 317.

21st: That thereupon an appeal was prayed from the decision of the District Court, in entering the decree above referred to, to the Circuit Court of Appeals for the Sixth Circuit, and a motion therein was made by the appellees to dismiss the appeal, which was denied, as reference thereto will more fully show the "New York," 104 Federal Reporter, 561.

22nd: That thereupon the case came up for hearing in the United States Circuit Court of Appeals for the Sixth Circuit, and the Court affirmed the decision and the decree of the District Court herein last before mentioned, as will more fully appear from the decision of the Court in the case of the "New York," 108 Federal Reporter, 102.

23rd: That thereupon a petition for a writ of certiorari was filed in the Supreme Court of the United States, by the Union Steamboat Company, to be directed to the United States Circuit Court of Appeals for the Sixth Circuit, which said petition was granted, and thereupon the case came up for a hearing in the Supreme Court of the United States, and the decision of the said Circuit Court of Appeals was affirmed, as will appear from the full text of said decision found in the case of the Union Steamboat Company vs. Erie & Western Transportation Company, 189 United States, 363.

13 24th: That thereupon the mandate of the Supreme Court of the United States issued to the District Court of the United States for the Eastern District of Michigan, affirming the decree entered by the said Court on the 24th day of March, 1900, and execution issuing thereon this libellant, as the successor of the Union Steamboat Company, was compelled to pay the amount of said decree, with interest thereon at the rate of 7 per cent. per annum, as provided by the said decree.

25th: That the Court having decided and found that the said Propellers "Conemaugh" and "New York" were both at fault for the said collision, they therefore, became and were liable each for one half of all the damages arising out of the said collision, and that the total amount of the said damages, as agreed to by the said stipulation of the parties, amounted to the sum of $74,319.49, and the Union Steamboat Company and libellant became and were therefore, liable for the sum of $37,159.74, one half of the total damages arising out of the said collision, and deducting from this the damages sustained by the Propeller "New York", left the sum of $32,817.94 for it to pay, but instead thereof the said District Court, by its decree and the execution thereunder, compelled the Union Steamboat Company and libellant to pay the sum of $52,552.55.

26th: That the said decree was arrived at by compelling the

Union Steamboat Company and libellant to pay all of the damages sustained by the Intervening Insurance Companies, amounting in the aggregate to $19,841.56, and also the total damages, to the cargo, represented by the Erie & Western Transportation Company as trustee, and amounting to the sum of $19,627.67, or a total of $39,469.23, and that it did not permit the Union Steamboat Company or libellant to recoup or offset one half of the foregoing
14 sums, paid on account of the loss and damage to the cargo, against the claim of the Erie & Western Transportation Company, on account of the damages to the Propeller "Conemaugh," because they claimed that affirmative relief in that respect had not been demanded by separate pleadings, and that the Union Steamboat Company and libellant therefore must be relegated to its separate remedy against the "Connemaugh" for a recovery of a moiety of the damages paid on account of the cargo.

27th: That the Union Steamboat Company and libellant have, at different times in the proceedings, prayed the Court to decree, and the Erie & Western Transportation Company to pay the aforesaid sum, but the said Erie & Western Transportation Company has failed so to do, and the Union Steamboat Company and libellant were therefore, compelled to pay the aforesaid difference of $19,734.61, with interest thereon at the rate of 7 per cent. per annum from the 24th day of March, 1900, to the time of payment, upon which said sum libellant is entitled to the legal rate of interest to the date of its payment by the owner of the "Connemaugh."

28th: That libellant is entitled to recover from the said Propeller "Conemaugh" and her owners, the Erie & Western Transportation Company, the aforesaid sum of $19,734.61, with interest thereon to the date of payment.

29th: That all and singular the premises are true.

Wherefore libellant prays that process in due form of law may issue against the Propeller "Connemaugh," her engines, boats, boilers, machinery, tackle, apparel and furniture, and that this Honorable Court will be pleased to pronounce for libellant's demand and decree the same paid, with costs and interest, and that the said Propeller be condemned and sold to pay the same, and for such
15 other and further relief and redress in the premises as in law and justice libellant is entitled to receive.

ERIE RAILROAD CO.,
by C. E. KREMER,
Proctor

C. E. KREMER,
W. O. JOHNSON,
Proctors.

State of Illinois, }
County of Cook. } ss.

On this 6th day of February, A. D. 1904, before me personally appeared C. E. Kremer, Proctor, the agent of the above named libellant, and was sworn to the truth of the foregoing libel.

THEO. C. ROBINSON,
(Seal) *Notary Public.*

(Endorsed) 9576. District Court of U. S. North. District of Ills. Erie Railroad Co. vs. Prop. Conemaugh. Libel. Filed Feb. 6, 1904. T. C. MacMillan, Clerk. C. E. Kremer, W. O. Johnson, Proctors for Libellant.

And afterwards, to wit, on the 6th day of February, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Libellant's Stipulation, same being in the words and figures following, to wit:

16 LIBELANT'S STIPULATION.

United States of America, }
Northern District of Illinois, } ss.
Northern Division. }

United States District Court,..... Term, A.D.18.... whereas, a Libel was filed in this Court on the 6th day of February A. D. 1904, by Erie Railroad Company, against the Propeller Conemaugh her boilers, engines, machinery, boats, tackle, apparel and furniture, for the reasons and causes in said libel mentioned, and praying that the same may be condemned, and sold to answer the prayer of the libelant; and the said libelant and C. E. Kremer, Charles W. Greenfield, sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant, or its sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libelants above named shall pay all such costs as

shall be awarded against it by this Court, or, in case of appeal, by the Appellate Court.

ERIE RAILWAY CO.,
by C. E. KREMER, *Proctor.*
C. E. KREMER.
CHARLES W. GREENFIELD.

Taken and acknowledged this.....day of.....A. D. 18.....
before me.

Northern District of Illinois:- } ss.

C. E. Kremer, party to the above stipulation, being duly sworn, depose and say that he reside in the Northern District of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

C. E. KREMER.

Sworn this 6 day of February, A. D. 1904 before me.

CHARLES W. GREENFIELD,
(Seal) *Notary Public.*

17 (Endorsed) 9576. District Court United States, Northern District of Illinois, Northern Division. In Admiralty. Erie Railroad Co. vs. Propeller "Conemaugh." Libelant's Stipulation. Filed February 6, 1904. T. C. MacMillan, Clerk. C. E. Kremer, W. O. Johnson, Proctor for Libelant.

18 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Claim, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

Erie Railroad Company,
vs.
Propeller "Conemaugh," her engines, etc., } In Admiralty.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, Within and for said District:

Now comes the Erie & Western Transportation Company, a corporation of the commonwealth of Pennsylvania, owner of the said propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, intervening for its interest in the said property, appears before this Honorable Court and claims the said property and states that the said Erie & Western Transportation Company is the true and bona fide owner thereof, and that no other person or persons are the owners thereof.

And thereupon, the said claimant prays that this Honorable Court will be pleased to decree a restitution of the aforesaid property to said owner, The Erie & Western Transportation Company, and otherwise right and justice to administer in the premises.

THE ERIE & WESTERN TRANSPORTATION CO.
by J. C. EVANS, *W. Mngr.*

19 Subscribed and sworn to before me by J. C. Evans this 19th day of February, A. D. 1904, at Buffalo, in the State of New York.

EDWARD H. CHASE,
[SEAL] *Notary Public.*

In the District Court of the United States for the Northern District of Illinois. No. 9576. Erie Railroad Company, vs. Propeller "Conemaugh," her engines, etc. Claim. Filed April 18, 1904. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Claimant.

20 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond, same being in the words and figures following to wit:

Know all Men by these Presents, That we, The Erie & Western Transportation Company, as principal, and The Bankers Surety Company, as surety, do hereby acknowledge ourselves, jointly and severally, to be held and firmly bound unto The Erie Railroad Company in the sum of Thirty Thousand Dollars, lawful money of the United States of America, to be paid unto the said Erie Railroad Company, its successors or assigns, to which payment well and truly to be made, we hereby bind ourselves our successors and assigns firmly by these presents:

Sealed with our Seals and dated this 19th day of February in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

Whereas, a Libel has been filed in the District Court of the United States within and for the Northern District of Illinois on the 6th day of February, A. D. 1904, by The Erie Railroad Company against the propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, in a certain action, etc., civil and maritime, for damages, wherein it is alleged that there is due and owing to the said Erie Railroad Company the sum of Nineteen Thousand Seven Hundred Thirty-four and 61/100 Dollars ($19734.61).

The Condition of this Obligation is such, that if the above bounden Erie & Western Transportation Company shall abide and answer the decree of the Court in such cause, then the above obligation to be void, otherwise to be and remain in full force and virtue.

THE ERIE & WESTERN TRANSPORTATION CO.
by J. C. EVANS, *W. Mngr.*

THE BANKERS SURETY COMPANY,
21 D. A. MACBETH,
2nd Vice President.
Attest: HOWARD H. BURGESS,
Secretary. [Seal]

Taken and acknowledged before me and signed by the Erie & Western Transportation Company in my presence, at Buffalo in the State of New York, this 19th day of February, A. D. 1904.

EDWARD H. CHASE,
[Seal]. *Notary Public.*

Taken and acknowledged before me and signed by the Bankers

Surety Company in my presence at Cleveland in the State of Ohio, this 15 day of April, A. D. 1904.

TRACY H. DUNCAN,
Notary Public in and for County of Cuyahoga and State of Ohio.
(Seal)

Approved C. E. KREMER,
Proctor.

I hereby approve of the above bond.

.....
United States District Judge.

(Endorsed) In the District Court of the United States for the Northern District of Illinois. No. 9576. Erie Railroad Company vs. Propeller "Conemaugh," her engines, etc. Bond. Filed April 18, 1904, T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for claimant.

22 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court in the above entitled cause, Exceptions of The Erie & Western Transportation Company, said Exceptions being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company, *Libelant*; vs. Propeller "Conemaugh," Her engines, etc., Erie & Western Transportation Company, *Claimant.*	Exceptions of the Erie & Western Transportation Company, *Claimant.*

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, for the Northern District of Illinois.

Claimant excepts to the libel filed herein on the following grounds:

I. That the allegations of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.

II. Because it appears from said libel that the Union Steamboat Company, under the course and practice of the admiralty courts of the United States, has already had its day in court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the Court, and the same is res adjudicata.

III. Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit the libellant to maintain this action would be to permit the splitting of a single cause of action.

IV. Because libellant by its predecessor in ownership of the propeller New York has already had its day in a court of competent jurisdiction, has presented its claim, had it adjudicated upon and has received payment, according to the course and practice of
23 admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all matters arising from or in consequence of said disaster, and if it failed to set up and claim any damage or right growing out of said collision, it is estopped from now presenting it.

THE ERIE & WESTERN TRANSPORTATION CO.,
By GOULDER, HOLDING & MASTEN,
Its Proctors.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libellant, vs. Propeller "Conemaugh" her engines, etc., Erie & Western Transportation Company, Claimant. Exceptions of the Erie & Western Transportation Company, Claimant. Filed April 18, 1904. T. C. MacMillan, Clerk. Goulder, Holding and Masten, Proctors for Claimant.

24 And afterwards, to wit, on the 13th day of June, A. D. 1904, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Co.
9576. vs.
Propeller Conemaugh

This cause coming on to be heard on the exceptions to the libel herein, come the parties by their proctors and after arguments, the Court being fully advised in the premises overrules said exceptions, to which ruling of the Court the claimant duly excepts; whereupon the claimant is ruled to answer the libel herein within one week from this day, and this cause is set down for hearing on June 23, 1904, at ten o'clock A. M.

25 And afterwards, to wit, on the 23d day of June, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Answer, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company,
Libelant,
vs.
Propeller "Conemaugh,"
her engines, etc.,
Respondent.
} Answer.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois.

The answer of the Erie & Western Transportation Company, Claimant of the Propeller Conemaugh, her engines, boilers, boats, tackle, apparel and furniture, to the libel of the Erie Railroad against said propeller.

I. Respondent says that it is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and as such is now and at all times hereinafter mentioned was sole owner of the propeller Conemaugh, her engines,

boilers, boats, tackle, apparel and furniture, and as such owner it has claimed and bonded said propeller Conemaugh in this proceeding and has been admitted to defend.

II. Respondent admits the allegations of the First, Second, Third, Fourth, Fifth and Sixth Articles of said libel.

III. Respondent admits the seventh Article of said Libel and further answering said article says that the Union Steamboat
26 Company, in addition to setting up the damages suffered by the New York in its answer in said cause, on or about the 25th day of February, 1892, filed its cross-libel against the propeller Conemaugh claiming its said damage, and that said damage was adjudicated upon, and by the final decree referred to in said libel was paid by the Erie & Western Transportation Company in accordance with the course and practice in admiralty in cases of mutual fault.

IV. Respondent admits the allegations of Articles Eighth and Ninth of said libel.

V. Touching the allegations of Article Tenth of said libel, respondent admits that the said insurance companies named therein did intervene in said cause as insurers on cargo for a part of the damage claimed by the Erie & Western Transportation Company as Trustee, but says that said intervention was prior to the entry of final decree in said cause in the District Court, to wit, prior to July 3, 1896, and that by the decree entered on said last mentioned date the amounts found due on account of cargo damage indemnified by said intervening insurance companies named was decreed to be paid directly to them.

VI. Respondent admits the allegations of the Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Articles of said libel.

VII. Touching the allegations of Article Sixteenth of said libel, respondent says that it did apply to the Supreme Court of the United States for a writ of certiorari; that said writ was granted and the cause removed to the Supreme Court of the United States, was there heard and determined, and that the decision thereof was as reported in 175 United States Report, at p. 187: that the Court therein found both the propeller Conemaugh and New York at fault, and held that the damages to the steamers be divided.

27 VIII. Claimant admits the Seventeenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-third Articles of said libel.

IX. Answering the Twenty-fourth article of said libel, respondent admits that the Supreme Court of the United States affirmed the decree of March 24, 1900, of the District Court of the United States for the Eastern District of Michigan, and issued its mandate of

affirmance, but respondent denies that libelant, as successor to the Union Steamboat Company, was by execution compelled to pay the amount of said decree and interest thereon at seven per cent. (7) per annum, or any sum, and further answering said article says that the mandate referred to in said article was dated January 22, 1900; that on or about the 16th day of May, 1901, either the Union Steamboat Company or libelant paid to the four insurance companies mentioned in the Tenth, Eighteenth, and Nineteenth Articles of said libel the sums therein named and interest at seven per cent. (7%) per annum from July 3, 1896, until paid, but claimant is uninformed as to the exact date of the payment or the amount thereof. Respondent says that said insurance companies were insurers on cargo of the steamer "Conemaugh." which had been damaged in said collision, and as such had paid the loss sustained by the owners of said cargo by reason and in consequence of said collision.

And further answering said article, respondent says that while said cause was pending in the Supreme Court of the United States under writ of certiorari issued on petition of the Union Steamboat Company as in the Twenty-third Article alleged, the following named insurance companies, also insurers on and paying damage to said cargo, to wit, The Manheim Insurance Company of Manheim, Germany; The Fireman's Fund Insurance Company of San Francisco; The London Assurance Corporation and The
28 British & Foreign Marine Insurance Company, on September 8, 1902, did intervene by leave of Court for the entire amount of damage to cargo ordered by the decree of July 3, 1896, to be paid to the Erie & Western Transportation Company, as Trustee, to wit, Nineteen Thousand, Six Hundred Twenty-seven and 61/100 Dollars ($19,627.61) and the interest thereon at the rate of seven per cent. (7%) per annum from July 3, 1896, until paid, predicating their intervention upon the claim therein assented to by all the parties that the said interventors were insurers upon cargo of the propeller Conemaugh and on account of which said sum was decreed to respondent as trustee, and as such insurers they paid to the owners of said cargo the amount of their loss by reason of said collision and subsequent sinking of the Propeller Conemaugh. That on or about the 25th day of May, 1903, either the Union Steamboat Company or libellant paid said sum of Nineteen Thousand, Six Hundred, Twenty-seven and 61/100 Dollars ($19,627.61), with the interest thereon at seven per cent. (7%) per annum from July 3, 1896, to said date of payment, in all the sum of Twenty-nine Thousand, One Hundred and 20/100 Dollars ($29,100.20), and that the whole of said sums was paid to the insurance companies which intervened as hereinbefore stated by reason of their having

as insurers paid the owners of the cargo of said propellor Conemaugh the loss to cargo on account of which recovery was made.

X. Touching the allegations of the Twenty-fifth and Twenty-sixth Articles of said libel, claimant denies the same and avers that the decree of March 24, 1900, of the District Court for the Eastern District of Michigan, was in accord with the mandate of the Supreme Court of the United States and was so held to be by the United States Circuit Court of Appeals for the Sixth Circuit in the cause referred to in the Twenty-second Article of
29 said libel, and by the Supreme Court of the United States on two separate hearings, as referred to in the Twentieth and Twenty-third Articles of said libel.

Further answering said articles of said libel, this respondent admits that there was paid by libellant or the Union Steamboat Company on account of loss of and damage to cargo of the Propeller Conemaugh the sums hereinbefore stated; that libelant was not permitted to recoup or offset one-half or any part of the amount so paid from or against the amount decreed to be paid to this claimant in the proceedings referred to in said libel, but respondent avers that the Union Steam-boat Company did demand relief on account of damage suffered by it in said collision; that such relief was granted and that libellant and the Union Steamboat Company has, in accordance with the course and practice of the admiralty in cases of mutual fault, had relief in said proceedings on account of its damage, and that if it failed to claim all the relief to which it might be entitled, it has waived its right to now make such claim, and to permit libelant to make a further claim by reason of any matter or thing growing out of said collision would be to permit the splitting of a single cause of action.

XI. Answering the Twenty-seventh Article of said libel, claimant admits that the Union Steamboat Company during the course of said proceedings in said libel mentioned, sought to have decreed against this claimant one-half the damage sustained by cargo, and to recoup against damage due respondent, but that the said District Court of the United States declined so to do, but did decree that the whole of said cargo damage should be paid by libellant in accordance with the mandate of the Supreme Court of the United States, and that the action of the said District
30 Court of the United States for the Eastern District of Michigan in that regard was affirmed by the Supreme Court of the United States and by the United States Circuit Court of Appeals for the Sixth Circuit, and again reaffirmed by the Supreme Court, as hereinbefore and in said libel shown, and respondent says that libelant's claim of right to recoup or recover one half or any part

of said sum so paid on account of damage to cargo from this respondent was denied in said proceedings by the Supreme Court of the United States, and this Court is without jurisdiction to review the action of said court.

XII. Respondent denies that libellant is entitled to recover from the propeller Conemaugh the sum of Nineteen Thousand, Seven Hundred, Thirty-four and 61/100 Dollars ($19,734.61), with interest thereon, or any other sum, and denies that any sum whatever is due to libellant, or that libelant has any cause of action whatsoever against the propeller Conemaugh.

XIII. Answering the Twenty-ninth Article of said libel, defendant denies that all and singular the premises are true, and says that the averments of said libel do not show facts which would create a lien against said propeller Conemaugh, and says the claim set up in said libel is not within the admiralty and maritime jurisdiction of this Honorable Court. And respondent further answering says the damage referred to in said libel has been adjudicated by a court of competent jurisdiction as in said libel shown, with full right, opportunity and obligation upon the Union Steamboat Company and libellant to present any and all claims or rights it had in reference thereto that libelant has had its day in court by its predecessor, the Union Steamboat Company, as to all claims
31 growing out of the disaster therein referred to; that the Union Steamboat Company presented and had adjudicated its claim against the propeller Conemaugh and this claimant, and in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault has received satisfaction of its claim so presented; that if libellant or the Union Steamboat Company for any reason neglected to or elected not to set up any claim or right or damage growing out of said disaster which it had or ought to have in the proceedings in said libel referred to, it has waived the same and is now estopped from asserting it.

XIV. And further answering said libel, respondent says that all and every part of the cargo of said propeller Conemaugh on account of which damage were allowed in the proceedings referred to in said libel and on account of which libellant or the Union Steamboat Company has made payment, was being transported under bills of lading containing the following agreement:

"Whenever any liability for loss of, or damage to, all or any of said property shall arise, that person or party, or vessel then engaged in the actual carriage or having custody of the property shall be deemed the carrier, and be solely liable for such loss or damage, (and the person or party liable who might sustain loss in

consequence of owning or chartering, or being interested in or as to such vessel, shall have any insurance, however affected, on, as to or covering the property lost or damaged and all benefit and advantage to be derived therefrom.

And respondent says that insurance against the perils which operated to the damage of said cargo of the Conemaugh and on account of which damages were awarded was affected, and paid to the full amount of said damage by the insurance companies which intervened in said cause and neither the owners of said cargo or libelant or any one claiming through or under them has any claim against the propeller Conemaugh, on which said cargo so damaged was being transported at the time, for damage to said cargo,
32 said damage as to it having been compensated in full by insurance. And further answering, respondent says that said contract of carriage under which said cargo on account of which damage has been paid by libelant or its predecessor, the Union Steamboat Company, was being transported, contained the following agreement:

"The said company shall not, nor shall any carrier, person or party, vessel or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs." And respondent says that no such written claim or other claim has been made upon this claimant by any of the owners of said cargo, or any one on their behalf, within the thirty days after the occurrence of said disaster, or at any time, and that no action was brought against it or its said steamer for said damage within three months after said damage occurred.

XV. And your respondent further avers that Section 15 of Chapter 83 of the laws of the State of Illinois provides:

"Action on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

That more than twelve years have elapsed since the happening of the damage set up in said libel, and the same is barred by said statute.

XVI. That all and singular the premises are true.

Wherefore your respondent prays that this Honorable Court will be pleased to decree the dismissal of said libel, with costs to this

respondent, and such other and further relief as it may be entitled to receive in the premises.

33 THE ERIE & WESTERN TRANSPORTATION COMPANY,
by GOULDER, HOLDING & MASTEN,
its proctors, Respondent.

GOULDER, HOLDING & MASTEN,
Proctors for respondent.

Western District and State of New York, } ss.
County of Erie. }

E. T. Evans, being duly sworn, says that The Erie & Western Transportation Company is a corporation; that he is its Vice-President and duly authorized herein; that he has read the foregoing answer, and that the allegations and averments therein contained are true, as he verily believes.

E. T. EVANS.

Subscribed in my presence and sworn to before me by the said E. T. Evans, this 18th day of June, A. D. 1904.

EDWARD H. CHASE,
Notary Public.

[SEAL.]

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Respondent. Answer. Filed June 23, 1904 at 9 o'clock A. M. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Respondent.

34 And afterwards, to wit, on the 23rd day of June, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Stipulation, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
In Admiralty.

Erie Railroad Company, *Libelant,*
vs.
Propeller Conemaugh, her engines, etc., Erie & Western Transportation Company, *Claimant.*
} Stipulation.

It is hereby stipulated between the libelant and claimant as follows:

I. That libelant or claimant may use any part of the printed record or records or proceedings in the causes referred to in the libel in this cause without other verification than comparison, but subject to objection by other party on the ground of materiality, competency or relevancy.

II. That the goods composing the cargo of the propeller Conemaugh on account of loss and damage to which libelant or the Union Steamboat Company made payment as shown, were at the time of such loss or damage being transported on steamer Conemaugh under bills of lading containing terms of carriage, etc., as in Exhibit "A" herein attached, the blanks therein being filed to cover the various consignments.

III. That on the goods as aforesaid, insurance was effected by the owners thereof with the several companies named in the answer herein, insuring the same against the loss and damage referred to in said libel, and the said insurance companies, under the insurance so effected, became liable for and paid to the owners of said cargo the amount of the loss and damage so sustained.

IV. That none of the owners of the cargo which was lost or damaged in said collision, or the insurers thereon, made claim in writing or otherwise to or upon the propeller Conemaugh or the said Erie & Western Transportation Company, its owner, within thirty days after the occurrence of said damage or at all, or bring any action against the Propeller Conemaugh or her owner, the Erie & Western Transportation Company, for any loss or damage so sustained within three months after said loss or damage occurred or at all.

Subscribed this .....day of June A. D. 1904.

ERIE RAILROAD COMPANY,
By C. E. KREMER, *its Proctor.*
ERIE & WESTERN TRANSPORTATION COMPANY
by HARVEY D. GOULDER,
its Proctor.

36 B. L. Eng. Con't.

The Erie & Western Transportation Co.
Anchor Line, on Great Lakes.
Lake Connection of the Pennsylvania Railroad Company.
Via Erie or Buffalo, at Carrier's Option.

Shipped by..... the following described property in apparent good order, but weight, quality, value, contents and condition of contents unknown. To be carried or forwarded subject to all of the conditions hereinafter contained, to the Port of.....(with Liberty to the carrying ship to call at all intermediate ports), and thence by..... to the Port of.....(or so near thereto as ship may safely get, with the previlege of calling at any usual port of call), and to be delivered in like good order, subject to said conditions, unto.....
or to.....assigns (Notify.....)
upon payment immediately on discharge of the property, of the freight thereon, at the rate of.....Cents, American Gold, per one hundred pounds gross weight and advanced charges..... ($.....)
with all other charges and average as hereinafter provided, without any allowance of credit or discount; one pound sterling to be considered equal to $4.80 American Gold.

Form No. 12, Foreign—Steam.

	Principal Agencies.	Chicago,
	J. C. Evans, Agent,	Milwaukee,
	D. M. Brigham, Agent,	St. Paul,
	S. B. Gault, North-western Agent,	Minneapolis,
	C. A. Clawson, Agent,	Winona,
37	H. C. Shepard,	Winona,
	O. J. Geer, General Agent,	New York.
	T. C. Pollock, Agent,	
	L. N. Walton,	Philada.
	R. B. Glanville,	Baltimore.

Marks and Numbers.	Articles and Weight.
E Y L P P O M C A S	Said to Weigh.....

1st: In accepting this bill of lading, the Shipper, Owner and Consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee, or Holder.

2d. The responsibility of each Carrier shall be limited to its own line.

3rd. The said Erie & Western Transportation Company, shall not, nor shall any carrier, or any person or party in possession of all or any of said property, or any vessel which received all or any of the said property or her master, be liable for any loss or damage sustained by any person or party, or for any loss of or damage to, all or any of the said property, arising from, caused by or connected with any one or more of the following mentioned causes or things, to wit: Any act of God, or a public enemy; any act or government or municipality, or any official act, any rebellion, insurrection, mob, riot, strike or combination, any peril, danger or accident of or incident to navigation or transportation, receipt or delivery, storage, or wharfage; any fire, collision, explosion of any kind, bursting or collapse of any boiler, pipe, chest, or flue, any latent defect, or any unseaworthiness or unfitness of or in any
38 vessel or other means of transportation not known to the person or party sought to be made liable; breakage or derangement of any machinery, decay, leakage, wastage, shortage of grain, breakage, wet, steam, combustion, heating, rust, dirt, frost or freezing, rubbing or chafing, contact with or nearness to other property, detention, delay, seizure, under legal process, loss or decrease of weight or quantity, change of weather, transshipment, loading or unloading, lighterage improper packing, bailing, or cooperage; any change in market value, any act or thing herein permitted; nor shall there be any liability on the part of said Company, or any carrier, person or party, vessel or her master aforesaid, or on the part of any other vessel owned, chartered, or used by said Company, or her owner or master, for any loss or damage herein mentioned, unless the same shall affirmatively, and without presumption, be proven to have been caused by the negligence of the person, party or vessel sought to be made liable, nor even if caused by any such negligence, for any loss of or damage to any statue, picture, goldware, silverware, plated ware, coin, bullion, jewel or watch, unless special contract for the transportation thereof other than this be made by special written authority from this Company, nor shall there be any liability for or on account of any wrong or mistaken carriage or delivery of, or failure to deliver, any property marked, consigned or addressed improperly or indefinitely,

June or in initials, characters or numbers; nor in case of alteration or erasure in this instrument shall there be any liability aforesaid, which would not have existed had such alteration or erasure not been made. Non-compliance with any ordinance or bylaw shall not be deemed negligence or evidence of negligence. Whenever any liability for loss of, or damage to, all or any of said property shall arise that person or party, or vessel then engaged in actual carriage or having custody of the property shall be deemed the carrier, and be solely liable for such loss or damage; and the person or party liable, or who might sustain loss in consequence of owning, chartering or being interested in or as to such vessel, shall have
39 any insurance, however effected, on, as to or covering the property lost or damaged and all benefit and advantage to be derived therefrom and at the option of such person or party, all amounts of such loss or damage shall be computed on the basis of the value of the property at the place above provided for its delivery, or at its cost at the time and place of its above mentioned receipt. The said Company shall not, nor shall any carrier, person or party, vessel or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party, sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months, after the said loss or damage occurs. Any vessel having all or any of said property on board, may tow or be towed, and may save or aid, or attempt to save or aid, life, person or property, and may delay or deviate for, or with a view to any such purpose, or for, or with a view to, any purpose connected with her navigation or business. General average payable according to Lake custom. All weights shall, at the option of any carrier, be determined by said carrier's scales; and all weights furnished to any carrier shall be subject to correction. If any nitroglycerine, gunpowder, friction matches, fireworks, or other explosive, or if any property, the carriage of which is prohibited by law, shall be received without knowledge as to its nature, and written assent to its carriage, by the receiver or carrier thereof, the same may, without notice of any kind, be destroyed, without liability therefor, or, at the option of the carrier, may be removed and stored, at the sole risk and expense of the owner.

4th: As to The Erie and Western Transportation Company, this contracy is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the port of.....

.....The said The Erie & Western Trans- Stip
40 portation Company shall not, nor shall any of its connections, 23
inland or ocean, be liable for delay, nor in any other respect than as warehousemen, while the said property remains on wharf waiting for further conveyance.

It is also stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer of the line above stated leaving, after the arrival of such articles at said Port the said The Erie & Western Transportation Company, the Steamship Company, Steamer or owner is at liberty to forward them by succeeding steamers of said line, or, if deemed necessary, in the steamers of any other line.

5th: In respect to the service after delivery by The Erie & Western Transportation Company, at the port as aforesaid it is mutually agreed as to the Steamship Company, Steamer, Owner, and all other parties undertaking, any part of said service as follows: The ship shall have liberty to sail without pilots; to tow and assist other vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship. General average payable according to York Antwerp Rules of 1890.

It is also mutually agreed that the Steamship Company, Steamer or owner shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause and wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage
41 of labor by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master mariners or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrifaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or of the insufficiency of packages nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipments; nor for any loss or damage caused by the prolongation of the voyage.

June I. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, perfumeries, works of art, silks, furs, china porcelain, watches or clocks, in any respect, or for goods of any description whatever above the value of $20.00 per cubic foot, and in no case is the carrier to be liable beyond $500.00 per package unless bills of lading are signed therefor with the value therein expressed and a special agreement is made.

II. Also that shippers shall be liable for any loss or damage to ship or cargo caused by inflamable, explosive or dangerous goods, shipped without full disclosure of their nature whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

IV. Also, that in case the ship shall be prevented from
42 reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

V. Also, that the ship may commence discharge immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival, and upon discharge the goods shall be at the risk of the consignee. And if not taken by him within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and risk of their owners, and the responsibility of the steamship or steamship line for merchandise to be carried at a through rate to a point beyond the port of discharge shall terminate on the delivery of the goods or property to the next carrier.

VI. Also that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also, that if on sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the Custom House, less all charges saved, except a lower value of the articles has

been agreed upon with the shippers, and such value noted st
hereon.

43 IX. Also, freight payable on weight, is to be paid on gross weight discharged or landed from ocean steamship, unless otherwise agreed.

X. Also, goods destined for a Continental port, in the event of the Continental steamer being prevented by ice from reaching destined port, the Master reserves the liberty of either landing cargo at nearest open port he can reach with safety, or bringing it back to port of transshipment, in either case at consignees' risk and expense, but charging outward freight only; or, should the last steamer of the season have sailed for the above destined port, the goods may be sent to the port nearest to their destination with which there is direct communication, or may be warehoused at the intermediate port at the expense and risk of the owners of the goods.

XI. Parcels for different consignees collected or made up in single packages addressed to one consignee to pay full freight on each parcel.

XII. Also, that the property covered by this Bill of Lading is subject to all the conditions expressed in the customary forms of Bills of Lading in use by the ocean steamer of Ocean Steamship Company at the time of shipment.

Attention of shippers is called to the act of Congress of 1851. "Any person or persons shipping Oil of Vitriol, Unslaked Lime, Inflamable Matches, or Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States One Thousand Dollars."

In Witness Whereof, The Agent signing on behalf of the said The Erie & Western Transportation Company, and of the said Ocean Steamship Company, or Ocean Steamer and her Owner, severally

44 and not jointly, hath affirmed to.....Bills of Lading, all of this tenor and date, one of which Bills being accomplished and given up to the carrier, the others to stand void.

Dated in.....this.....day of.....189....

.....Agent.

(Endorsed) 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company vs. Propeller Conemaugh, etc. Filed June 23, 1904. T. C. MacMillan, Clerk. Stipulation. Goulder, Holding & Masten, Proctors for Respondent.

23. 45 And afterwards, to wit, on the 23d day of June, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Company
9576. vs.
Propeller Conemaugh

This cause coming on for trial, come the parties by their proctors and the Court having heard the libel and answer and stipulation of facts and arguments of counsel and not being sufficiently advised in the premises takes the cause under advisement.

11. 46 And afterwards, to wit, on the 11th day of August, A. D. 1904, the following order was had and entered of record in said cause. before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Company
9576. vs.
Steamer "Conemaugh."

At a stated term of the District Court, of the United States of America for the Northern District of Illinois, held at the Court Room in the Federal Building in the City of Chicago, on the 11th day of August, A. D. 1904, present the Honorable Christian C. Kohlsaat, District Judge. This cause having been heard on the pleadings and proofs and argued and submitted by the advocates of the respective parties, and due deliberation having been had in the premises, it is now Ordered, Adjudged and Decreed by the Court that the libelant above named recover herein against the Steamer "Conemaugh" the damages sustained by the libellant by reason of the matters set forth in the libel herein together with costs.

47 And afterwards, to wit, on the 24th day of August, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entiled cause, a Stipulation as to damages, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES, S

For the Northern District of Illinois.

Erie Railroad Company,
vs.
Steamer Conemaugh. } Statement of Damages.

Amount decreed insurers on cargo intervening in District Court, with interest at 7% to May 16, 1901, date of payment,	$26566.19	
One-half of this,		$13283.09
Amount decreed for insurers on cargo intervening in Supreme Court, with interest at 7% to June 9, 1903, when same was paid,	$29100.29	
One-half of this,		$14550.10
		$27833.19

August 22, 1904.

C. E. KREMER,
Proctor for Erie Railroad Company.
GOULDER, HOLDING & MASTEN,
Proctors for Erie & Western Transportation Company.

(Endorsed) 9576. District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad, Libelant vs. The Conemaugh, etc.

48 Stipulation as to damages. Filed Aug. 24, 1904. T. C. MacMillan, Clerk.

49 And afterwards, to wit, on the 24th day of August, A. D. 1904, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, to wit;

Erie Railroad Company,
9576. vs.
Steamer Conemaugh.

An interlocutory decree having heretofore been made and entered herein whereby it was adjudged that the libelant recover the damages sustained by reason of the matters and things in its libel set forth against the Steamer Conemaugh, her engines, etc., and the amount of the said damages, including the interest, having been fixed by stipulation on file, at the sum of $27833.19, it is

Ordered, Adjndged and Decreed that the libellant, the Erie Railroad Company, recover herein against the steamer Conemaugh, her engines, etc., the sum of $27833.19 and interest at 5% from Dec. 10, 1903, amounting to $28815.00, and that the Erie & Western Transportation Company, claimant of the said Steamer Conemaugh, and Bankers Surety Company pay into Court or to the proctors for the libellant, the damages and interest aforesaid, and that in default thereof the libellant may have execution therefor.

And it is also decreed that the libelant recover from the said Erie & Western Transportation Company and its surety, its costs taxed in this cause and amounting to the sum of $43.10 and that in default thereof, execution may issue therefor, to the entry of which decree said Erie & Western Transportation Company by its proctors duly excepts and enters its motion for an appeal.

50 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for appeal, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

Erie Railroad Company, *Libelant;*
vs.
Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, *Claimant and Respondent.* } No.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois.

And now by its proctors, Messrs. Goulder, Holding & Masten, comes the Erie & Western Transportation Company, respondent in the above entitled cause, and, having filed with the clerk of said District Court an assignment of error, prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final decree of the District Court in the above entitled cause, entered on the 24th day of August, 1904.

Dated this 24th day of October, 1904.

GOULDER, HOLDING & MASTEN,
Proctors for Respondents.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, Claimant &
51 Respondent. Petition for Appeal. Filed Oct. 25, 1904. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Respondent.

52 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company, *Libelant;*
vs.
Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, *Claimant and Respondent.*

And now comes respondent, the Erie & Western Transportation Company, by Goulder, Holding & Masten, its proctors, and says that in the record and proceedings in this cause, and in the final decree entered therein, there is error in the following, among other things, to wit:

I. That the Court erred in overruling respondent's first exception, viz: That the allegations of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.

II. That the court erred in overruling respondent's second exception, viz: Because it appears from said libel that the Union Steamboat Compnay, under the course and practice of the admiralty courts of the United States, has already had its day in Court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the court, and the same is
53 res adjudicata.

III. That the Court erred in overruling respondent's third exception, viz: Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit libelant to maintain this action would be to permit the splitting of a single cause of action.

IV. That the Court erred in overruling respondent's fourth exception, viz: Because libellant by its predecessor in ownership of the propeller New York has already had its day in a Court of

competent jurisdiction, has presented its claim had it adjudicated upon and has received payment, according to the course and practice of admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all matters arising from or in consequence of said disaster, and if it failed to set up and claim any damage or right growing out of said collision, it is estopped from now presenting it.

V. The court erred in holding that the claim presented by the libel is within the admiralty and maritime jurisdiction of the court.

VI. The court erred in entering decree in excess of the amount claimed in the libel.

VII. The Court erred in decreeing that libellant was entitled to recover the sum of Twenty-eight Thousand Eight Hundred and Fifteen Dollars ($28,815), or any sum.

54 VIII. The Court erred in not dismissing the libel.

GOULDER, HOLDING & MASTEN,
Proctors for Respondent
THE ERIE & WESTERN TRANSPORTATION COMPANY.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, Claimant and Respondent. Assignment of Errors. Filed Oct. 25. 1904. T. C. MacMillan, Clerk. Goulder, Holding & Mastedn, Proctors for Respondent, the Erie & Western Transportation Company.

55 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Appeal, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

In Admiralty.

No.

Erie Railroad Company,
Libelant;
vs.
Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company,
Claimant and Respondent.
} Bond

Know All Men by These Presents that we, the Erie & Western Transportation Company, as principal, and The Bankers Surety Company, of Cleveland, Ohio, as surety, are held and firmly bound unto the Erie Railroad Company in the full and just sum of Four Thousand ($4,000) Dollars, to be paid to the said Erie Railroad Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed and dated this 24th day of October, 1904.

Whereas the above named Erie & Western Transportation Company has appealed to the United States Circuit Court of Appeals for the Seventh Circuit from a decree in favor of the above named libelant made and entered on the 24th day of August, 1904, in the above entitled action, by the District Court of the United States for the Northern District of Illinois, praying that said decree may be reversed.

Now, Therefore, the condition of this obligation is such that if the above named appellant shall prosecute its appeal to effect, and shall answer all damages and costs if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

In Witness Whereof the parties have hereunto caused their cor-

porate names to be subscribed and their corporate seals to be affixed, the day and year above written. Bond file 190

(Seal) THE ERIE & WESTERN TRANSPORTATION COMPANY,

By FRANK J. FIRTH,
President.

Attest: FRANK STALEY,
Secretary.

56 THE BANKERS' SURETY COMPANY,
W. P. JOHNSON,
Vice President.

Attest: HOWARD H. BURGES,
(Seal) *Secretary.*

The above bond on appeal approved.
Oct. 25, 1904,

KOHLSAAT,
Judge.

(Endorsed) 9576. District Court U. S. Northern Dist. of Illinois. Erie Railroad Co. vs. Pro. "Conemaugh" et al. Bond on Appeal. Filed Oct. 25, 1904. T. C. MacMillan, Clerk.

57 And afterwards, to wit, on the 25th day of October, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit: Order 190 app

Erie Railroad Company,
Libellant,
9576. vs.
Propeller "Conemaugh," her engines, etc.,
Erie & Western Transportation Company,
Claimant and Respondent.

On petition of the Erie & Western Transportation Company, the above named Respondent, praying for the allowance of Appeal in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Circuit, it appearing to the Court that the said respondent has filed its assignment of errors as required by the rules of the United States Circuit Court of Appeals for the Seventh Circuit, which are accepted, it is—

Ordered that the said appeal be, and the same is allowed; and it is further—

Ordered that the bond on appeal be and the same is hereby fixed in the sum of Four Thousand Dollars ($4,000.00).

58 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, Do Hereby Certify the above and foregoing to be a true and correct transcript of the record in Case No. 8576, In Admiralty, in which The Erie Railroad Company is Libellant, and the Propeller "Conemaugh" is Respondent, as the same appears from the records and files in said case now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago, in said District, this 19th day of November, A. D. 1904.

T. C. MACMILLAN,
Clerk.

(Seal)

Cost of transcript $20.00.

T .C. MACMILLAN,
Clerk.

59 United States of America } ss.

The President of the United States to the Erie Railroad Company and C. E. Kremer, its Proctor, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit to be holden in Chicago, within thirty days from the date hereof pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, Northern Division, wherein the Erie & Western Transportation Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, Judge of the said District Court of the United States this 25th day of October, in the year of our Lord one thousand nine hundred and four.

KOHLSAAT,
Judge.

Service of above notice and citation accepted this 25th day of October, 1904.

.....
Proctor for Erie Railroad Company.

I have served this writ within my District upon the within named Erie Railroad Company by reading the same to and in the presence and hearing of S. P. Shane, Freight Traffic manager, at the same time delivering to him personally a true copy thereof on the 31st day of October, A. D. 1904.

I was unable to find any other officer of the said Company within my district.

JOHN C. AMES,
U. S. Marshall.
by WM. E. CASS,
Deputy.

1 Service 2.00
1 Mile .06

$2.06

IN THE DISTRICT COURT OF THE UNITED STATES;

For the Northern District of Illinois:

Erie R. R. Co.
v.
Propeller Conemaugh. } In Admiralty. No. 9576.

KOHLSAAT, *J.*

On November 11, 1891, the owners of the defendant brought suit to recover damages sustained by defendant in collision with the Propeller New York owned then by the Union Steamboat Co. to which ownership libellant herein has succeeded, and also to recover as trustee for the owners or underwriters of the cargo.

The New York, being for the purposes hereof, the libellant herein, filed a cross libel for damages sustained by her. The District Court held the New York to be alone in fault. On appeal the Circuit Court of Appeals for the Sixth Circuit reversed the finding and held the respondent herein to be alone in fault. On certiorari the Supreme Court held both vessels in fault and decided that the New York must pay the full damages of the cargo owners or their intervening representatives. On receiving the mandate, the District Court entered a decree in favor of the Conemaugh to the effect that the intervenors and the Conemaugh as trustee for cargo owners recover the full amount of the damages against the New York and at the same time refused to permit the New York to recoup or off set any damages except such as was sustained by the propeller, New York. On appeal from this decree the Court of Appeals affirmed the same and in its opinion stated that the right of set off, counter-claim or recoupment, being in no way set up in the pleadings the appellant, not being obliged to assert such claim for contribution by way of recoupment in that cause, were left "free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings is therefore denied." The cause was again taken to the Supreme Court by certiorari and affirmed, the court stating in its opinion that "The New York having been in

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fault, was responsible to the cargo and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it."

This proceeding is instituted in accordance with the suggestion of the said Circuit Court of Appeals and the Supreme Court, for contribution. The main contention here is as to whether the rights of libellant are based upon the doctrine of subrogation or that of contribution. The Conemaugh had a good defense as against claims of the cargo owners and other intervenors and seeks to interpose that fact as a defense to any attempt on the part of libellant herein to recover from her any part of the cargo damages.

If the libellant was compelled to pay damages for cargo losses, by reason of negligence to which the Conemaugh contributed, as was held by the Supreme Court, then it is of no consequence whether the Conemaugh was liable to her cargo owners or not, and she must be held to be liable for one half of the damages caused by her negligence jointly with that of the libellant. She had no such contractual relations with libellant. If the right of recovery rests wholly upon the doctrine of subrogation, then libellants claim would be disallowed. It cannot be that the court of appeals and the Supreme Court meant to decide that libellant herein should be denied the right to save its rights under the Statute of Limitations by amendment and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute. If, however, the right of recovery is based upon the doctrine of contribution, then libellant's demands are not out-lawed. This seems to me to be the reasonable construction to be placed upon the decisions of the upper court.

Libellant may present a draft of a decree in accordance herewith.

IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the opinion of the Court in cause numbered 9576 entitled Erie R. R. Co. vs. Propeller Conemaugh as same appears from the original filed in said Court on the 24th day of August A. D. 1904, and now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this ninth day of December A. D. 1904.

T. C. MACMILLAN,
Clerk.

(Seal)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit,

October Term, A. D. 1904.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company,
Appellee.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above cause that the foregoing is a true copy of the opinion of the Judge of the District Court in the above cause, and that the same, together with this stipulation, may be filed in said cause and printed by the Clerk and attached to the printed transcript of record now on file.

HARVEY D. GOULDER,
Proctor for Appellant.
C. E. KREMER,
W. O. JOHNSON,
Proctors for Appellee.

IN THE CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company,
Appellee.
No. 1137.

Upon stipulation of the parties, it is hereby ordered that leave be and hereby is given to file in said cause instanter an authenticated copy of the opinion of the Judge of the District Court in said cause, and the Clerk of this Court is hereby authorized and directed to print the same, together with the stipulation of the parties with reference thereto, and attach the same to the printed transcript of record heretofore filed in said cause.

(Endorsed) Filed Dec 12 1904 Edward M. Holloway, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 46, inclusive, contain a true copy of the printed record filed in this court on the third day of December, 1904, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court and upon which the cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Erie & Western Transportation Company* v. *Erie Railroad Company,* No. 1137, October Term, 1904, as the same remains on the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-ninth day of September, A. D. 1905.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[SEAL]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States court-rooms, in the City of Chicago in said Seventh Circuit, on the fourth day of October, 1904, of the October term in the year of our Lord, one thousand nine hundred and four, and of our Independence the one hundred and twenty-ninth.

And afterwards, to-wit: On the twenty-second day of November, 1904, in the October term last aforesaid, came the appellant, by its counsel, Mr. Harvey D. Goulder, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904.

Erie and Western Transportation Company,
vs.
Erie Railroad Company,

The Clerk will enter my appearance as counsel for the appellant.

HARVEY D. GOULDER,
Cleveland, Ohio.

Endorsed: Filed November 22, 1904.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the thirtieth day of November, 1904, in the October term last aforesaid, came the appellee, by its counsel, Mr. C. E. Kremer and Mr. W. O. Johnson, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904.

Erie and Western Transportation Company,
Appellant,
vs.
Erie Railroad Company.

The Clerk will enter my appearance as counsel for the appellee.

C. E. KREMER,
W. O. JOHNSON.

Endorsed: Filed November 30, 1904.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the third day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 3, 1905.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge, presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

Erie and Western Transportation Company,
1137
vs.
Erie Railroad Company,

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 31, 1905.

And afterwards, to-wit: On the thirty-first day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 31, 1905.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge, presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set for hearing on the third day of the April session of the October term, 1904.

And afterwards, to-wit: On the eleventh day of April, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 11, 1905.

Court met pursuant to adjournment.

Before:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing April 14, 1905.

And afterwards, to-wit: On the fourteenth day of April, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, April 14, 1905.

Court met pursuant to adjournment.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Harvey D. Goulder and Mr. Frank S. Masten, counsel for appellant, and by Mr. C. E. Kremer, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the first day of August, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above entitled cause, which opinion is in the words and figures following, to-wit:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904. April Session, 1905.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company.

Appeal from the District Court of the United States for the Northern District of Illinois.

Before GROSSCUP, BAKER and SEAMAN, *Circuit Judges.*

This appeal is from a decree of the District Court, sitting in admiralty, in favor of the appellee, Erie Railroad Company, as libellant, for recovery of $28,815.00, against the steamer Conemaugh and the appellant Erie & Western Transportation Company, as claimant. The libel is in rem and propounds, in effect, that Erie Railroad Company is successor in interest to Union Steamboat Company, as owner of the propeller New York; that a collision occurred October 21, 1891, between the propellers New York and Conemaugh, resulting in the sinking of the Conemaugh; that proceedings thereupon arose in admiralty (which are detailed) wherein it was ultimately adjudicated that both vessels were at fault for the collision and each was liable for a moiety of the damages which ensued; that the final decree therein condemned the New York to pay the entire damage of the Conemaugh's cargo, without recoupment or allowance for one-half thereof chargeable to the Conemaugh, because no pleading was filed demanding such recoupment; that the libellant accordingly overpaid $19,734.61 which should have been borne by the Conemaugh and her owners, and was thus "relegated to its separate remedy against the Conemaugh"; and it is entitled to and prays recovery for such amount and interest thereon.

The prior proceedings in admiralty upon which the libel and decree rest the right of recovery are notable for their course and duration, and a summary is needful for understanding of the theory on which recovery was sought and allowed. As the appellant's brief well and concisely recites these facts (approved on behalf of the appellee as "substantially correct") such recital is incorporated in this statement, as follows:

"On the 21st day of October, 1891, a collision occurred in the Detroit River between the propellers New York, owned by the ap-

pellee's predecessor, the Union Steamboat Company, and the Conemaugh, owned by the appellant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.

"November 11, 1891, appellant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York, denying all liability, and attributing the disaster solely to the fault of the Conemaugh; also setting up the damage sustained by the New York as about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the physical damage to the New York, but no process was issued and the decree dismissing the cross libel was not appealed from by the Union Steamboat Company.

"On hearing both steamers held at fault: 53 Fed. 553. Rehearing was had, resulting in the New York being held solely in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Insurance Company, and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the sole fault lay with the New York.

"On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of appellant for its own damage, and as trustee for the cargo damage, the decree providing, however, that the amount allowed for cargo insured by the intervening companies be paid to them.

"The owner of the New York appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh solely at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this appellant *in personam* for the New York's damage: 82 Fed. 819. Petition for re-hearing was denied.

"This appellant and the intervening insurers petitioned the Supreme Court for writ of *certiorari*. The petition was granted, and on hearing both vessels were held at fault: 176 U. S. 187.

"Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to the appellant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay the entire cargo damage. The insurers on cargo

which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67, was decreed to appellant as trustee.

"The owner of the New York then petitioned the Supreme Court for writ of mandamus, directed to the District Court for the Eastern District of Michigan, to require said Court to enter a decree which would divide the damage to cargo equally between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S. 317.

"Although the application to the Supreme Court was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The Supreme Court said among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was matter for appeal.

"Thereupon the owner of the New York appealed from the decree so entered. Appellant [here] moved dismissal of the appeal on the ground generally that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only in conformity with the mandate, and so was the decree of the Supreme Court. The motion to dismiss was denied: 104 Fed. 561.

"The appeal was then argued and the decree below affirmed: 108 Fed. 102.

"The Union Steamboat Company then (in its turn) petitioned the Supreme Court for a writ of *certiorari*, which was granted. The cause was again tried in the Supreme Court and the decree which had been entered by the District Court on its mandate was affirmed: 189 U. S. 363.

"While in the Supreme Court the last time the insurers who had covered that portion of the cargo for which this appellant had continued thereto as trustee, intervened.

"May 16, 1901, after dismissal of the petition for mandamus by the Supreme Court, the owner of the New York paid so much of the cargo damage as the decree required to be paid to the intervenors, and after the affirmance of the decree by the Supreme Court the remaining damage and costs were paid as provided by the decree, and the case closed."

Objections to the libel, for want of jurisdiction and of *res adjudicata*, were raised by exceptions, and renewed by the answer. The answer further sets up, by way of defense, the bill of lading under which the cargo of the Conemaugh was carried, which contained provisions (1) giving to the carrier the benefit of insur-

ance on the cargo—such insurance being effected and the loss paid to the shipper—and provided against liability therefor, unless (2) written claim was made within thirty days, and (3) action was brought for any loss within three months; and it is averred that no claim was so made or action brought.

No issues of fact arose, as a stipulation was filed which brought in the printed records in the prior proceedings as evidence, and admitted the averments of the answer respecting the terms of lading, fact of insurance and payment of loss to the shipper, and that no claim was made by shipper or insurer, or suit brought against the Conemaugh for the cargo loss, within the limitations of the bill of lading.

SEAMAN, *Circuit Judge*, delivered the opinion of the court.

When the present libel was filed, to enforce further contribution against the Conemaugh for damages which the New York was condemned to pay, the liability arising out of the collision had been in litigation between these steamers, with cargo representatives impleaded, for upwards of twelve years. The controversy was various in results during its progress and prolific in contributions to judicial reports, including three unanimous opinions respectively in the Circuit Court of Appeals and the Supreme Court in its course. It resulted in a final adjudication of mutual fault, awarding all damages arising out of the collision, with recovery against the New York alone for cargo damage and equal division of the aggregate of damages to the steamers; so that, on the face of this record, it would seem that no issuable liability between the steamers could have escaped judicial settlement. Nevertheless, a novel and interesting question is presented for review, without precedent for the relief sought by this libel, under analogous conditions; and the contention upheld by the decree is not without seeming force, under the general authorities cited and intimations in the opinions upon final appeal from the former decree.

Primarily, however, jurisdiction is challenged to entertain the libel, in any view, as a claim to enforce an assumed right of contribution arising out of the payment by the New York of the entire cargo damage when mutual fault was adjudged, and the admiralty cognizance of such subject matter for independent relief, must be ascertained before inquiry is open whether jurisdiction can be exercised or relief be extended in the case at bar.

1. The broad jurisdictional objection is thus stated in the brief on behalf of the appellants: "that the right of contribution when it exists cannot be asserted in the admiralty, either *in rem* or *in personam*." Were the general proposition thus advanced an open question, and not clarified and ruled by the opinion of this court in *The Mariska*, 107 Fed. 989, 47 C. C. A. 115, its solution for the ob-

jects of the present case would not be free from difficulty in the light of the general authorities cited. But in that instance jurisdiction was upheld of an independent libel in rem, filed by the owners of the steamer Jay Gould against the Steamer Mariska, to enforce so called contribution for damages charged against and paid by the Jay Gould in a prior proceeding wherein the Jay Gould was the sole respondent, for the alleged mutual fault of that steamer and the Mariska in causing the collision. In effect, it was ruled that the contribution sought, which was the subject matter of the libel, was well recognized as a liability arising under the admiralty law, and as such was cognizable, not only as an incident to the primary cause for recovery of damages for the fault of both, but through an original libel to enforce the liability when not otherwise enforceable. This view we believe to be in harmony with the general line of American authorities, departing from the narrow interpretation which prevails in England and adopting that of the original admiralty jurisdiction, which was "interpreted by a more enlarged view of its essential nature and objects." *Insurance Co.* v. *Dunham*, 11 Wall. 1, 24. The case of the *Mariska* plainly authorizes admiralty cognizance of an independent libel for contribution; and this irrespective of the question whether the enforcement rests on the doctrine of subrogation to a lien in favor of the cargo, as there indicated, or upon the alleged liability to contribute by way of equalizing the burden for the fault and injuries, *vide The North Star*, 106 U. S. 17, 22.

In reference to the argument that rights resting on and merged in a decree are no longer maritime, in the jurisdictional sense, it may be observed that the rule is settled otherwise in early cases in admiralty (*Penhallow* v. *Doane's Admr.*, 3 Dall. 54, 86; *Jennings* v. *Carson*, 4 Cranch. 2, 21; *The Enterprise*, 2 Curt. 317, F. C. N. 4497; *The Centurion*, 1 Ware 490, F. C. No. 2554), though it well may be that such rule is applicable only to relief by way of enforcing the decree.

The general contention, that a libel for contribution cannot be entertained, is overruled.

2. The propositions on which the libel and decree rest are substantially these: That the maritime law creates an absolute liability against each of the contributors to a collision, mutually at fault, to bear an equal share of the resulting loss to vessels and cargo; that, because the New York was condemned in the prior litigation with the Conemaugh and the representatives of her cargo, among other liabilities, to pay the entire cargo damage, without recoupment or allowance for any share of such damage chargeable to the Conemaugh for her adjudged mutual fault—no pleading to that end having been filed by the New York—the fact of such adjudication and

of payment to the cargo representatives created *ipso jure* liability against the Conemaugh to reimburse one half of the amount so paid; and that, accordingly, exemption of the Conemaugh from liability to the cargo owners, under the bills of lading, furnishes no defense against such reimbursement by way of contribution. This contention assumes that the admiralty rule, that both vessels at fault for a collision must bear the damage in equal parts, creates distinct and absolute liability for each element of damage entering into the adjudication and payment; so that, failing such equal division of the cargo damage in the primary suit between the vessels, the charge to and payment by the New York alone raised an independent cause of action against the Conemaugh to pay one half the amount, though not obligated to the damnified cargo representatives for any part of such injury.

The theory on which *The Mariska* case *supra*, proceeded is thus adopted, in so far as it sanctions independent right of action for unquestionable contributory liability, but the further doctrine of that decision, that the right arises out of subrogation, is necessarily denied. Intimations of independent remedy to enforce contribution, in the event of actual liability of the Conemaugh for cargo damage, which appear in the opinions of the Circuit Court of Appeals, on final appeal of the New York in the primary suit (*The New York*, 108 Fed. 47, 102, 107, 47 C. C. A. 232), and of the Supreme Court, upon certiorari (*The Conemaugh*, 189 U. S. 363, 368), are assumed to sanction this theory and proceeding; although no sanction appears in either of these opinions for liability upon the part of the Conemaugh to cargo damage, if not liable to the cargo owners, and the opinion of the Circuit Court of Appeals clearly implies that the Conemaugh was not chargeable in such event. The extreme contention of absolute liability, however, notwithstanding both the failure to obtain division in the prior litigation and non-liability of the Conemaugh to the cargo representatives, is pressed in support of the present decree, and it is obvious that it can rest on no other ground.

As a general proposition of maritime law, with the effect of the adjudication left out of consideration, it is doubtless the doctrine of the cases referred to—*The North Star*, 103 U. S. 17, and the *Chattahoochie*, 173 U. S. 540—that the fact alone of non-liability of the Conemaugh to her cargo owners does not exonerate her from contributory liability to the New York, if the New York is, nevertheless, liable for such damages. Whether the doctrine of this line of authorities—which is peculiar to the maritime law and not of equitable origin—could be deemed applicable, as an original proposition, to the insurance provision in the instant bill of lading, either to charge the one steamer with full recovery in favor of the insurers,

or to enforce contribution against the other, is a question not arising upon this review, nor open to consideration, in our understanding of the effect of the proper adjudication, either in the admiralty or under the general law.

The general rule of admiralty, preserved from the ancient text of the law, is well settled in collision cases, that each vessel in fault is equally liable for injuries arising and must bear the damages equally, without reference to the degree of fault. *The North Star,* 106 U. S., 17, 20, and authorities reviewed. So, contrary to the rule at common law, one of the parties at fault can maintain a libel against the other for apportionment of the damage in conformity with such maritime rule. For cargo damage the parties injured may proceed against one offending vessel and obtain decree against it for the entire damage, unless the other, jointly liable, is brought into the proceeding; but when both are before the court the entire damages arising from the mutual fault are added together, and the amount is apportioned in equal parts to be borne equally by them. *The Atlas,* 93 U. S. 302, 313, 317. When liability against one is adjudicated without the presence of the other, the apportionment for mutual fault cannot be made, and the liability can then be apportioned in further proceedings as held in *The Mariska, supra.*

The rule, as defined under all the authorities referred to, plainly intends apportionment of the damages between the joint contributors at fault in a single adjudication. Thus in the instructive opinion of Mr. Justice Bradley, in *The North Star,* 106 U. S. 17, 20, 22, the distinguishing feature of the rule is pointed out, that the authorities recognize only an equal division of the aggregate joint damage and not a liability of one to the other for specific damages inflicted; that all concur in the view that "the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden." It was there held, accordingly, that the statutory limitation of liability on the part of one was not applicable until the aggregate of joint damage was ascertained, and then only "to avoid payment *pro tanto* of the balance found against such party." So in *The Chattahoochie,* 172 U. S. 540, 553, this language of the *North Star* case is adopted as equally applicable to cargo damage involved in the collision; and the provision known as the Harter act, touching cargo liability of the carrier, was held inapplicable until the aggregate injury was ascertained and apportioned under the rule. Of like effect is the case of *The George W. Roby,* 49 C. C. A. 481, 111 Fed. 601, 614.

The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining,

dividing and charging the liability between all parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were apportioned equally, the decree charges the cargo damages against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York, in the final hearing before the trial court and in both reviewing tribunals, upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here, for independent relief, upon averment that the burden of cargo damage was thus imposed for want of a pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed, touching all interests, with all damages apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively. These conclusions, thereupon, are unmistakably expressed in the opinions and carried out in the final decree: (1) That both steamers were at fault for the collision; (2) that the damages suffered by both steamers were ascertained, the aggregate sum divided and so charged in equal shares; (3) that the underwriters of the cargo, being innocent of the fault of either vessel, are entitled, as they insisted "to a recovery to the full amount of their damage against the New York, notwithstanding the Conemaugh may also be in fault for the collision"—175 U. S. 209—and this amount is ascertained and so charged; (4) that such provision in the decree conformed to the mandate of the Supreme Court, and if the trial court "erred in refusing to allow recoupment, the remedy is by appeal"—178 U. S. 320; and finally, in effect, (5) that division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon "of liability of the Conemaugh to her cargo underwriters" it could not be "summarily assumed that because she was found in fault, and liable to the New York for one half of her damages, she is also liable to the underwriters upon her cargo," and thus foreclose defense under the "special stipulations in her bills of lading," which are asserted on behalf of the Conemaugh as written therein "to set up against the claims of the underwriters." *The New York,* 108 Fed. 102; 47 C. C. A. 232; affirmed in *The Conemaugh,* 189 U. S. 363.

The adjudication of liabilities arising out of the collision and apportionment thereof, which thus appear is, as we believe, the proceeding in admiralty contemplated by the rule (as defined in *The North Star, supra,* and *The Chattahoochie, supra*), for all cases

of maritime collision. It is unquestionably *res judicata* upon all matters involved in that contest. The right of the underwriters to recover the entire cargo damage against The New York, irrespective of fault on the part of The Conemaugh, is there settled. However questionable it may appear, whether such amount was justly recoverable in view of the provision now disclosed in the bill of lading, giving the Conemaugh the benefit of insurance on her cargo—that is, whether the introduction of such contract would not have served as a defense, in whole or in part, when the Conemaugh was found in fault, on the authority of *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.* 117 U. S. 312, 324, 325 and other cases—nevertheless full recovery was awarded and is now incontestible.

We are of opinion that such adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms; although it may extend to the enforcement of contribution against one not involved in such decree, for recognized joint liability within its contemplation.

The remark in the final opinion of the Supreme Court (*The Conemaugh,* 189 U. S. 363, 367), in reference to the modification of the decree there sought, if applicable to the like contention for review, is decisive of the present libel, namely: "The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done." The present decree, in effect, not only accomplishes the modification of the former decree, which was thus refused by both appellate tribunals, but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely, if the appellate jurisdiction is inadequate for such object, it is not within the coordinate jurisdiction of another court, sitting in admiralty, to grant relief from the terms of the prior decree, or to reopen the controversy.

Assuming for the inquiry (with no intimation of such conclusion from the facts) that equities appear in any phase of the case, for charging either the owners of the Conemaugh or the underwriters with a share of the liability thus imposed upon the New York, the equities so assumed arise out of the conduct and results of the litigation in reference to such claim of cargo damage, and not out of the collision, and so treated are not cognizable in admiralty, apart from a primary cause to establish the respective rights and liabilities of the parties concerned. Courts of admiralty are not vested with the powers of a court of equity, though equitable principles

are observed and equities recognized, when the primary cause is within their limited jurisdiction. *The Eclipse,* 135 U. S. 599, 608, and cases cited. If the supposed right to enforce contribution exists the way is not afforded in the admiralty forum.

In no aspect of the case, therefore, can we discover ground for the exercise of jurisdiction in the admiralty to intervene for the relief granted by the decree from which this appeal is brought, or for any form of relief under the circumstances stated in the libel. Accordingly, the decree of the District Court is reversed, with direction to dismiss the libel, as not stating a case for relief in the admiralty.

And afterwards, to-wit: On the first day of August, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, August 1, 1905.

Court met pursuant to adjournment.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company.	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said district court with direction to dismiss the libel as not stating a case for relief in admiralty.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 15, inclusive, contain a true copy of the papers filed (except briefs of counsel) and proceedings had thereon, in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Erie and Western Transportation Company v. Erie Railroad Company, No. 1137, October Term, 1904, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at City of Chicago, this twenty-ninth day of September, A. D. 1905.

[UNITED STATES CIRCUIT COURT OF APPEALS. SEVENTH CIRCUIT.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh District.

64 United States Circuit Court of Appeals for the Seventh Circuit.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit to Bring Before the Supreme Court the Case of

THE ERIE RAILROAD COMPANY
vs.
THE PROPELLER CONEMAUGH, ERIE & WESTERN TRANSPORTATION COMPANY, Claimant.

It is stipulated and agreed by and between the parties hereto, by their respective proctors, that the certified copy of the transcript of record in this cause, filed by the Clerk of this Court, and now on file in the office of the Clerk of the Supreme Court of the United States, in an application therein made for a writ of certiorari in this cause, entitled Erie Railroad Company *vs.* Propeller Conemaugh, number 433 of the October term, 1905, shall be taken as a return to the writ of certiorari granted and issued by the Supreme Court of the United States on the 31st day of October, 1905.

C. E. KREMER,
W. O. JOHNSON,
Pr. Libellant.
HARVEY D. GOULDER,
Proctor for Defendant.

Endorsed: 1137. U. S. Circuit — of Appeals. Erie R. R. Co. *vs.* Prop. Connemaugh. Stipulation. Filed Nov. 14, 1905. Edward M. Holloway, Clerk. C. E. Kremer, W. O. Johnson, for Libellant.

65 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erie & Western Transportation Company is appellant and Erie Railroad Company is appellee, No. 1137, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the

said Circuit Court of Appeals and removed into the Supreme
66 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of October, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

67 [Endorsed:] File No. 19,935. Supreme Court of the United States. No. 433, October Term, 1905. Erie Railroad Co., *vs.* Erie & Western Transportation Co. Writ of certiorari. Filed Nov. 14 1905 Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Erie and Western Transportation Company, appellant, *vs.* Erie Railroad Company, appellee, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of November, A. D. 1905.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

68 [Endorsed:] File No. 19,935. Supreme Court U. S. October Term, 1905. Term No. 433. Erie Railroad Co., petitioner, *vs.* Erie and Western Transportation Co. Writ of certiorari and return. Filed Nov. 17, 1905.

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FILED
OCT 16 1905
JAMES H. McKENNEY,
Clerk

No. [redacted].134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to bring before the Supreme Court the case of the Erie Railroad Company against the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

To the Honorable Judges of the Supreme Court of the United States:

The petitioner respectfully shows to this court:

First—That your petitioner is a corporation and on the 30th day of June, 1896, it merged the Union Steamboat Company in with it by virtue of the laws of New York, and thereby acquired and became possessed of all the estate, property, rights, privileges and franchises of the said Union Steamboat Company in substantially the same manner as the same were held by the latter, and by virtue of such merger it became entitled to collect and claim all debts and claims due the said Union Steamboat Company from any person or party.

Second—That this case grows out of a collision which occurred on the 21st day of October, 1891, between the Propeller New York, then owned by the Union Steamboat

Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

Third—That on the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of said collision.

Fourth—The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

Fifth—A trial was had in the District Court and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

Sixth—This decision was, on petition for re-hearing, reversed and the New York was held solely at fault.

Seventh—That thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	8,553.06
Marine Insurance Company	916.57
	$19,841.56

Eighth—To all of the petitions of the above intervenors the Union Steamboat filed its answer, denying all liability

for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

Ninth—The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

Tenth—A petition for a writ of certiorari was then filed and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Eleventh—In obedience to the mandate issued after this decision the District Court entered a decree which held the New York liable *for all of the cargo damage* and one-half of the damage sustained by the Conemaugh.

Twelfth—A petition was then filed by the owner of the New York, in this court, praying for a writ of mandamus, to issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued and after a hearing this court denied the writ and held that if the owner of the Conemaugh felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thirteenth—Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Fourteenth—Thereupon the case came up for a hearing on the merits and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Fifteenth—Thereupon a petition for a *writ of certiorari* was filed in this court. This was granted, and the case came up for a hearing, and in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. Co. v. *E. & W. Trans. Co.*, 189 U. S., 363.

Sixteenth—The court thereupon issued its mandate and the petitioner was compelled to pay, and did pay, the decree in which the owner of the New York was compelled to pay *all of the* cargo damage.

Seventeenth—Thereupon this petitioner filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

Eighteenth—An appeal was taken and hearing had in the United States Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

Nineteenth—The pleadings in the District Court were

the libel, answer, and agreed state of facts. Petitioner alleges that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in holding, as follows:

(5) "That division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *

"We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms." Thereby misconstruing the opinion of this court in *New York*, 178 U. S., 317.

The concluding words of which are as follows:

"But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The court erred in holding as follows:

> "Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in 189 U. S. 366, which is as follows:

> "The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of U. S. Circuit Court of Appeals in 108 Fed. Rep., 47, which is as follows:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in this

case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again on page 107 the courts say:

"The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

3d. In holding that the libelant has had its day in court, and has been heard to ask the contribution now demanded in the libel, and that the trial court, the Court of Appeals, and this court has denied such right, and that therefore no independent proceeding can be brought in admiralty to recover contribution, all of which is contrary to the fact as it appears from the decisions of the Court of Appeals and this court, as found in the opinions reported in the cases: 108 Fed. Rep., 47; 178 U. S., 317, and 189 U. S., 363.

4th. Petitioner further alleges that this court, having held that the right of contribution by way of recoupment had not been prayed for by separate pleadings, therefore the owners of the New York could not be heard upon this question, and that the question of whether there should be contribution or not between the New York and Conemaugh as to the cargo damage was not passed upon by it, and was therefore still open and undetermined, and could therefore be made the subject of a separate suit either in admiralty or equity.

5th. That the decision of the Court of Appeals deprives the libelant of its right to recover contribution in a case of collision in which both the New York and Conemaugh have been held at fault, and under the law and practice in admiralty each should bear and pay one-half of the total damages, when such right is not barred or the amount of recovery reduced by any contract or statute or limitations.

That the decision of the Court of Appeals is contrary to law, as petitioner is informed, and deprives the libelant of its day in court, and its right to be heard upon its claim against the Conemaugh for one-half of the damages to her cargo which the New York was compelled to pay, and which the Conemaugh, under the law and practice, should bear and pay.

Wherefore your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this honorable court for such proceedings as shall seem just.

Erie Railroad Comp
by James P. Sher
General Agen

B. Kremer

Johnson

Proctors for Petitioner.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

James P. Sherwin being duly sworn, deposes and says that he is the agent of the petitioner herein, the Erie Railroad Company; that said petitioner is a corporation; that deponent has read the foregoing petition; that the allegations therein contained are true, of his own knowledge, except as to the matters and things therein stated upon information and belief and as to those matters he believes it to be true, because he has been more or less familiar with the various steps taken in the litigation referred to in the said petition.

James P. Sherwin

Subscribed and sworn to before me this 11th day of October, A. D. 1905.

Walter M. Johnson
Notary Public

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be allowed.

D. J. Schuyler

J. W. Greenfield

FILE COPY.

No. [redacted]134

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. MCKENNEY
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

Brief in Support of Petition.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Seventh Circuit to bring before the Supreme Court the case of the Erie Railroad Company vs. the Propeller Conemaugh, Erie & Western Transportation Company, claimant.

BRIEF FOR PETITIONER.

This case arises out of a collision between the Steamer Conemaugh and the Propeller New York, decided by this court.

The New York, 175 U. S., 187.

The court held both steamers at fault and decided that the New York must pay the damages sustained by the owners and insurers of the Conemaugh's cargo.

The case again came before the court upon an order to show cause, directed to the judge of the District Court, who entered a decree under the mandate.

Ex parte Union Steamboat Co., 178 U. S., 317.

In this decision the court held that the question of recoupment not having been decided by it at the former hearing, could not be brought to the attention of this court by a

petition for a writ of mandamus, but must go, if the party feels itself aggrieved, by appeal to the United States Circuit Court of Appeals. Thereupon the Circuit Court of Appeals heard the case on appeal, and decided that the question of the right of the New York to recoup one-half of the cargo damages against the Conemaugh was not at issue before it, because the pleadings praying such recoupment had not been filed, and also holding that the right to recover the moiety of the cargo damage could be made the subject of an independent separate suit. The owner of the New York thereupon petitioned for a writ of certiorari, which was granted, and this court again heard the case,

The U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363,

and again held affirming the decision of the Circuit Court of Appeals as we construe it, *that the owners of the New York had a right, by an independent suit, to recover the moiety of the cargo damage of the Conemaugh or her owners.*

Thereupon a libel was filed in the United States District Court for the Northern District of Illinois by the Erie Railroad Company, owner of the Propeller New York, against the Steamer Conemaugh to recover from it the sum of $19,734.61 with interest, this being one-half of the damages paid by the owner of the New York to the shippers and insurers of the cargo of the Conemaugh.

The District Court entered a decree for the libelant which the Circuit Court of Appeals for the Seventh Circuit Court reversed; holding that there was jurisdiction in admiralty of a libel for contribution, but that the question of whether there should be contribution or not was *res adjudicata* by virtue of the decisions of this court, above referred to.

We contend that the Circuit Court of Appeals misconstrued the decisions of this court in that regard, and that the

right of the New York to recover contribution by separate and independent suit has not been decided by this court or the Circuit Court of Appeals for the Sixth Circuit.

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * *

> The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, or that this court held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide and did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.
North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit the rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, setoff or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell*, 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexandre*, 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrongdoers, when these were the libelant and defendant then before the court.

The District Court, however, held in this case that it could not be done without a cross libel or petition—the Cir-

cuit Court of Appeals for the Sixth Circuit sustained the District Court in this, but said (108 Fed. Rep., 107):

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

The Court of Appeals denied the motion to amend the pleadings, because the question of recoupment could be raised by the owner of the New York in an independent proceeding against the Conemaugh, in which it could assert its claim for contribution.

Had it thought otherwise it is fair to assume it would have granted the motion to amend the pleadings in that court, or would have remanded the case with leave to the owners of the New York to do so.

An appeal in admiralty entitles the appellant to a trial *de novo*.

Gilchrist v. *Chicago Ins. Co.*, 104 Fed. Rep., 566.

It is almost needless to say that the Court of Appeals did not consider that its decision settled and ended the question of the apportionment of the damages, or passed upon the question of whether there should be contribution or not.

Proctors for the Conemaugh even when the case was before this court again on the second writ of *certiorari*, being Case No. 97, admitted in their brief in that case, that these parties had a right to an independent action, for they say in their brief, at page 11:

> "So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is

not compelled to resort to it; it is optional whether he assert the right in the original suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file counter claim by way of cross libel or to bring an independent action. This was determined by this court in *The Juniata*, 93 U. S., 337, and followed in the present case, 175 U. S., 187."

Neither court nor counsel up to this point in this litigation, viz., after the court's decision in the original case, 175 U. S., 187, and on the petition for a writ of mandamus, 178 U. S., 317, supposed that the question of recoupment was *res adjudicata*.

The Court of Appeals for the 6th Circuit holds so in almost so many words. It would not, in the exercise of that broad and liberal jurisdiction in admiralty cases have denied the motion to amend the pleadings, and thereby deprive the New York of the well established right to offset or recoup, if it had thought there was no independent right of action.

Up to this point neither this court nor the Circuit Court of Appeals held that the question of contribution was *res adjudicata*. We are therefore compelled to look for it in this court's last decision, viz.:

U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363.

It is all there is left.

The language of this case quoted by the Court of Appeals, that is supposed to be so fatal in its effect, and so destructive of what up to this time was considered by the Court of Appeals for the Sixth Circuit as a clear right to proceed by independent suit is as follows:

"The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with

> the Conemaugh. This, we think, should not be done."

In conclusion the Court of Appeals comments upon this language as follows:

> "The present decree in effect not only accomplished the modification of the former decree, *which was thus refused by both appellate tribunals,* but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely if the appellate jurisdiction is inadequate for such object, it is not within the co-ordinate jurisdiction of another court sitting in admiralty, to grant relief from the terms of the prior decree or to re-open the controversy."

The court is clearly in error when it says that the decree of the District Court in this case now *modifies the former decree and bars the contest of liability on the part of the Conemaugh to the cargo owners.* This is an error because the answer of the Conemaugh sets out all her defenses, including the clauses in her bill of lading. All these defenses were considered and passed upon by the District Court here, and were again urged before the Circuit Court of Appeals in this case.

The owner of the Conemaugh *has not lost* any of its rights, and can and has in this proceeding urged all the defenses, which it claimed it could not do if recoupment was allowed without pleadings.

With all its rights preserved the Conemaugh cannot complain of the proceedings in the present case; every opportunity is given to put forth all her defenses. As the Court of Appeals for the Sixth Circuit said, referring to an independent proceeding by the New York:

> "No special equity appearing, this will be no injustice."

The Court of Appeals has given the following words of this court (189 U. S., 363) too much weight, referring to the attempt to recoup cargo damage against the Conemaugh: "This should not be done." The succeeding words of the opinion, however, are not quoted and they are:

> "The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York, having been in fault, was responsible to the cargo, *and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it.*"

The court construed the words "and if as between her and the Conemaugh, she have a claim for recoupment, the way *is open* to recover it," as if it read the way *was not open* to recover it. This court said that the way *was open*, and not that it had been closed, or that *it had been* open and was open no longer.

Can there be any doubt what this court meant or intended to convey by these words, in the light of what the Court of Appeals had said, viz., page 106:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. *The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated.*"

And on page 107:

> "The appellants, not being obliged to assert their

> cross demand or claim for contribution by way of recoupment in this cause, did not do so. *This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh.* No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

This court, therefore, when it said "*the way is open to recover it,*" affirmed what was said by the Circuit Court of Appeals, as much in this as in its conclusion, that the decree was in conformity with the mandate issued upon the decision in 175 U. S., 187.

And Judge Kohlsaat, in his opinion as to this, says (see record):

> "It cannot be that the court meant to decide that the libelant herein should be denied the right to save its rights under the statute of limitations by amendment *and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute.*"

It is apparent that the district judge too, construed the language of this court, "*that the way is open,*" as entitling the New York to file its libel to recover what it could not recoup because no pleadings demanding it had been filed in the former suit.

The Court of Appeals now say this language of this court means that THE WAY IS NOT OPEN, *or that the way was once open, but now was open no longer*, and barred forever.

The Court of Appeals denies the right to file this libel, because they say this court has so decided and held:

> That this claim now urged has been adjudicated.
> That the New York has had her day in court.

That she cannot be heard again.

That the questions urged are *res adjudicata*, and all this in the face of this words of the court, *"if as between her (New York) and the Conemaugh she have a claim for recoupment, the way is open to recover it."*

We certainly supposed we were pursuing that way.

The court has decided here that a Court of Admiralty has jurisdiction of a libel for contribution. There is therefore but one question now to be settled, viz.: Has this court, in its opinions, foreclosed libelant's right to recover contribution?

In our judgment it has not, and the decision of the Court of Appeals should be reversed.

The questions between the New York and Conemaugh, for contribution, were never passed upon by this court, or any other. They could only arise under the doctrine of recoupment. This court expressly decides that on the original hearing this question was not raised, argued or decided. (*New York*, 178 U. S., 317.) This court again decided that the New York could not be heard because of the absence of the necessary pleadings, *and therefore the New York as against the Conemaugh on the question of contribution has never had its day in court*, and the questions are, therefore, not finally disposed of between these parties, and the rule of *res adjudicata* does therefore not apply.

The authorities upon what is *res adjudicata* are as follows:

Van Fleet on Former Adjudications, Sec. 256, says:

"Unless the defendants contest an issue with each other, either upon the pleadings between them and the plaintiff, or upon cross pleadings between themselves, it will not be *res adjudicata* in a litigation between

them. * * * A judgment against them, if there are no issues between them, does not bind them as to each other."

Citing *State Bank of St. Louis* v. *Bartlett*, 114 Mo., 276.

O'Connor v. *New York Land Co.*, 28 N. Y., 544.

In *Bulkley* v. *House*, 21 L. R. A., 247, the court said:

"A judgment against several defendants is not conclusive as between themselves in respect to their rights and liabilities toward each other."

In the case of *State Bank of St. Louis* v. *Bartlett*, the court said:

"The rule is that, when the parties to a suit were not adversaries under the pleadings, the judgment against them does not conclude either, so as to prevent him from showing in a contest between themselves that the obligations should be borne by the other."

In the case of *Koelsh* v. *Mixer*, 53 Ohio St., 207, an action was brought by a surety on a bond against his cosurety for contribution. Defendant plead a former adjudication in a case in which plaintiff and defendant had been parties defendant, and that defendant was released from liability. The Supreme Court would not allow the plea, saying:

"Whilst the exact limits of the doctrine of *res adjudicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced on the same issues, between the same parties, or their privies, standing in adversary character to one another.

"*It is not enough that an issue may have been*

joined between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue may have been, it was not in issue between himself and his co-defendant, the plaintiff in this action, and could not, therefore, conclude the latter; though parties to the suit they were not such in an adversary character, being simply co-defendants to the suit on the bond. * * *

"It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they are adversary parties in the original action."

The opinion in this case contains citations to many pertinent authorities.

In this case as to the cargo damage the Conemaugh and New York were only co-defendants.

The law applicable to the present state of facts is correctly stated in the case of:

Cottingham v. *Earl of Shrewsbury*, 3 Hare, 27.

"If a plaintiff can not get at his right without trying and deciding a case between co-defendants, the court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiffs does not require or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be necessary only to the decree the plaintiff obtains."

McCall v. *Carpenter*, 18 Ohio, 297.

Packet Co. v. *Sickles*, 5 Wall., 580.

In the latter case the court (at page 592) says:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied

on by way of evidence as conclusive, *per se*, it must appear, *by the record of the prior suit*, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Cromwell* v. *County of Sac*, 94 U. S., 353, it was held:

"In all cases, therefore, where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be *as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.*"

In *Last Chance Mining Co.* v. *Tyler Co.*, 157 U. S., 683, it was held:

"A former judgment on a different matter of dispute between the same parties is conclusive only as to matters decided and *not as to other matters that might have been decided.*"

In Amer. & Eng. Ency. of Law, 1st Ed., Vol. 21, p. 200, the rule supported by many adjudications is thus laid down:

"It is not only necessary that every issue should be directly adjudicated upon in order to subject it to the doctrine of *res adjudicata*, but such issues must be definite, clear and certain. No degree of probability will be sufficient. Absence of doubt and presence of certainty is of vital importance."

The rule in the Ohio courts is the same.

In *Love* v. *Trueman*, 10 Ohio St., 45, it was said:

"Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties to a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined."

In *Porter* v. *Wagner*, 36 Ohio St., 471, it was held that:

"Where a judgment is relied on as an estoppel, the question *is not what the court might have decided in a former action, but what in fact it did decide, as shown by the judgment.*

"A judgment is conclusive by way of estoppel only as to facts, without the proof or the admission of which it would not have been rendered."

Can it then be said that the courts denied the conceded right of the New York to claim contribution, and turned her owner out of court to pursue a remedy which did not exist? A remedy which the respondent now says did exist in the former case and was passed upon and denied and therefore cannot be asked again.

This court never intended to cut off the New York's right to be heard to demand contribution in an independent proceeding in which the Conemaugh could interpose her defenses.

Our conclusions are:

1. That admiralty has jurisdiction in case of a libel f contribution was held by the Court of Appeals.

2. That the question of contribution between the N York and Conemaugh was not determined in any prior case by this court, because not presented by proper pleadings.

3. That the right of the New York to proceed by independent and separate suit was by the decisions of this court conceded and not foreclosed.

4. That upon this question the decisions of this court were and are not *res adjudicata*.

5. That therefore the owners of the New York had a right to file this libel for contribution against the Conemaugh to enforce a legal as well as an equitable claim, founded in this case upon a clear and well established rule of property.

We therefore pray that the court may grant the writ of *certiorari* so that the owner of the New York may be heard here and the controversy between the New York and Conemaugh finally determined.

Respectfully submitted.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioners.

Chicago, October, 1905.

FILE COPY.

No. 134.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

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JAMES H. McKEN

[redacted]

ERIE RAILROAD COMPANY,
Petitioner,

vs.

ERIE & WESTERN TRANSPORTATION COMPANY,
Respondent.

BRIEF FOR PETITIONER.

CHARLES E. KREMER,
Proctor for Petitioner.

W. O. JOHNSON,
Of Counsel.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 339

ERIE RAILROAD COMPANY,
Petitioner,

vs.

ERIE & WESTERN TRANSPORTATION COMPANY,
Respondent.

BRIEF FOR PETITIONER.

This case grows out of a collision which occurred on the 21st day of October, 1891, on the Detroit river, between the Propeller New York, then owned by the Union Steamboat Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

On the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of the said collision.

The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

A trial was had in the District Court, and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

This decision was, on petition for re-hearing, reversed, and the New York was held solely at fault.

Thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	2,553.06
Marine Insurance Company	916.57
	$19,841.56

To all of the petitions of the above intervenors the Union Steamboat filed its answers denying all liability for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

A petition for a writ of *certiorari* was then filed on behalf of the Conemaugh and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Upon the mandate issued after this decision, the District Court entered a decree which held the New York liable *for all of the cargo damage* and for one-half of the damage sustained by the Conemaugh.

A petition was then filed by the owner of the New York, in this court, praying that a writ of mandamus, issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued, and after a hearing this court denied the writ, and held that if the owner of the New York felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Then the case came up for a hearing on the merits, and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Thereupon a petition for a *writ of certiorari* was filed in this court on behalf of the New York. This was granted, and the case came up for a hearing, and

in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. v. *E. & W. Trans. Co.*, 189 U. S., 363.

The court thereupon issued its mandate and the owner of the New York was compelled to pay, and did pay, the decree, which included *all of the cargo damage.*

Thereupon the owner of the New York filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

An appeal was taken and a hearing had in the United States Circuit Court of Appeals for the Seventh Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

The pleadings in the District Court were the libel, answer, and agreed statement of facts.

We contend that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in deciding and holding as follows (Rec., 59):

(5) "That division of cargo damage was not

a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *

"We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms."

Thereby misconstruing the opinion of this court in the case of *New York*, 178 U. S., 317.

The concluding words of which are as follows:

"But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The Circuit Court of Appeals erred in deciding and holding as follows (Rec., 59):

"Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in the case reported in 189 U. S., 366, which is as follows:

"The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of the U. S. Circuit Court of Appeals in this case, reported

in 108 Fed. Rep., 102, which is as follows, on page 106:

> "The right of set-off or counter-claim or recoupment being in no way presented by any pleading in this case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again, on page 107, the court say:

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It decides and holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * * The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined

in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, but practically that this court expressly held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide in the former trials, and what it did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.

North Star, 106 U. S., 17.
Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit this rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, set-off or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell,* 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexander,* 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrong-doers, when these were the libelant and defendant then before the court.

The District Court, in pursuance of the mandate of this court, however, held in this case that it could

not be done without a cross libel or petition—the Circuit Court of Appeals for the Sixth Circuit sustained the District Court in this, but said (108 Fed. Rep., 107):

> "The appellants, not being obliged to assert t ir cross demand or claim for contribution b way of recoupment in this cause, did not do s This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

The Circuit Court of Appeals denied the motion to amend the pleadings in this case, because the amount to be recovered by recoupment could be recovered by the owner of the New York in an independent proceeding against the Conemaugh, in which it could assert its claim for contribution.

Had it thought otherwise it is fair to assume it would have granted the motion to amend the pleadings in that court, or would have remanded the case with leave to the owners of the New York to do so.

An appeal in admiralty entitles the appellant to a trial *de novo.*

> *Gilchrist* v. *Chicago Ins. Co.,* 194 Fed. Rep., 566.

It is almost needless to say that the Court of Appeals did not consider that its decision settled and ended the question of the apportionment of the damages, or passed upon the question of whether there should be contribution or not.

Proctors for the Conemaugh even when the case was before this court, on the second writ of *cer-*

tiorari, being Case No. 97, admitted in their brief in that case, that these parties had a right to an independent action, for they say in their brief, at page 11:

> "So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is not compelled to resort to it; it is optional whether he assert the right in the original suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file counter claim by way of cross-libel or to bring an independent action. This was determined by this court in *The Juniata,* 93 U. S., 337; and followed in the present case, 175 U. S., 187."

Neither court nor counsel up to this point in this litigation, viz., after the court's decision in the original case, 175 U. S., 187, and on the petition for a writ of mandamus, 178 U. S., 317, supposed that the question of contribution was barred by the rule of *res adjudicata.*

The Court of Appeals for the Sixth Circuit holds so in almost so many words. It would not, in the exercise of that broad and liberal jurisdiction in admiralty cases have denied the motion to amend the pleadings, and thereby deprived the New York of the well established right to offset or recoup, if it had thought there was no independent right of action.

Up to this point neither this court nor the Circuit Court of Appeals held that the question of contribution was *res adjudicata.* We are therefore compelled to look for it in this court's last decision, viz:

U. S. Co. v. *E. & W. T. Co.,* 189 U. S., 363.

It is all there is left. If it cannot be found here

it does not exist, and the Circuit Court of Appeals was in error in so deciding.

The language of this case, quoted by the Court of Appeals, that is supposed to be so fatal in its effect, and so destructive of what up to this time was considered by the Court of Appeals for the Sixth Circuit as a clear right to proceed by independent suit, is as follows:

> "The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done."

In conclusion the Court of Appeals comments upon this language as follows:

> "The present decree in effect not only accomplished the modification of the former decree, *which was thus refused by both appellate tribunals*, but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely if the appellate jurisdiction is inadequate for such object, it is not within the coordinate jurisdiction of another court sitting in admiralty, to grant relief from the terms of the prior decree or to re-open the controversy."

The court is clearly in error when it says that the decree of the District Court in this case now *modifies the former decree and bars the contest of liability on the part of the Conemaugh to the cargo owners.* This is an error because the answer of the Conemaugh sets out all her defenses, including the clauses in her bill of lading. All these defenses were considered and passed upon by the District Court, and

were again urged before the Circuit Court of Appeals in this case.

The owner of the Conemaugh *has not lost* any of its rights, and can and has in this proceeding urged all the defenses, which it claimed it could not do if recoupment was allowed without pleadings in the original case.

With all of its rights preserved the Conemaugh cannot complain of the proceedings in the present case; every opportunity is given to put forth all her defenses. As the Court of Appeals for the Sixth Circuit said, referring to an independent proceeding by the New York, as in this case: "No special equity appearing, this will be no injustice."

The Conemaugh has answered every allegation of the libel in this case, and has set out in full all of the defenses which the ingenuity, enterprise and diligence of able counsel could suggest or urge. Upon these there was full hearing in the District Court. This clearly appears from the opinion of the District Court.

The Court of Appeals has given the following words of this court (189 U. S., 363) too much weight, referring to the attempt to recoup cargo damage against the Conemaugh, viz: "This should not be done." The succeeding words of the opinion, however, are not quoted and they are:

> "The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York, having been in fault, was responsible to the cargo, *and if, as between her and the*

Conemaugh, she have a claim for recoupment, the way is open to recover it."

The court construed the words, "and if as between her and the Conemaugh, she have a claim for recoupment, the way *is open* to recover it," as if it read the way *was not open* to recover it. As we understand this language, in the light of the opinion of the Circuit Court of Appeals for the Sixth Circuit, this court said, *that the way was open* and not that it had been closed, or that *it had been* open and was open no longer, or that all the questions in the case were *res adjudicata.*

Can there be any doubt what this court meant or intended to convey by these words, in the light of what the Court of Appeals had said, viz., page 106:

> "The right of set-off or counter claim of recoupment being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio.* It was not a defense which the appellant was obliged to then present. *The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."*

And on page 107:

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. *This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh.* No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

This court, therefore, when it said "*the way is open to recover it,*" affirmed what was said by the Circuit Court of Appeals, as much in this as in its conclusion, that the decree was in conformity with the mandate issued upon the decision in 175 U. S., 187.

And Judge Kohlsaat, in his opinion as to this says, (see Rec., 43):

> "It cannot be that the court meant to decide that the libelant herein should be denied the right to save its rights under the statute of limitations by amendment *and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute.*"

It is apparent that the district judge, too, construed the language of this court, "*that the way is open,*" as entitling the New York to file its libel to recover what it could not recoup because no pleadings demanding it had been filed in the former suit.

The Court of Appeals now say this language of this court means that THE WAY IS NOT OPEN, *or that the way was once open, but now was open no longer,* and barred forever.

The Court of Appeals denies the right to file this libel, because they say this court has so decided and held, viz:

> That this claim now urged has been adjudicated.
>
> That the New York has had her day in court.
>
> That she cannot be heard again.
>
> That the questions urged are *res adjudicata,* and all this in the face of these words of the court, "*if as between her (New York) and the Conemaugh she have a claim for recoupment, the way is open to recover it.*"

When we filed this libel we certainly supposed we were pursuing that way.

The court has decided in this case that a Court of Admiralty has jurisdiction of a libel for contribution. There is therefore but one question which the court must first decide, viz: Has this court, in its opinions, foreclosed libelant's right to recover contribution?

In our judgment it has not, and the decision of the Court of Appeals should be reversed.

The questions between the New York and Conemaugh, for contribution, were never passed upon by this court, or any other. They could only arise under the doctrine of recoupment. This court expressly decides that on the original hearing this question was not raised, argued or decided. (*New York,* 178 U. S., 317.) This court again decided that the New York could not be heard because of the absence of the necessary pleadings, *and therefore the New York as against the Conemaugh on the question of contribution has never had its day in court,* and the questions are, therefore, not finally disposed of between these parties, and the rule of *res adjudicata* therefore does not apply.

The decision of this court in *New York,* 175 U. S., 187 (which is the original case), does not decide that the New York is debarred from suing for, or collecting contribution of the Conemaugh. The court's decision means no more than that the innocent cargo owner or his underwriter may pursue and recover from one or both of the joint *tort feasors.* In this case the right existed against the New York alone, because the Conemaugh had not been impleaded with the New York, had not been made a

party defendant with the New York, and therefore there could be no recovery against her. It was not that no recovery was to, or could be had against her, or because she was not liable, but solely because she was not a party. No suit had been brought against the Conemaugh by the cargo owners. Suit had only been brought against the New York, and the court finding her, as well as the Conemaugh, at fault for the collision, the cargo owner had a right to recover from her, not alone a moiety of the damage, but the whole of it. This was done under a rule established by this court in the well known cases of *The Atlas,* 93 U. S., 302; *The Juniata,* 93 U. S., 337.

The District Court therefore entered such a decree, and denied the right of the New York for contribution, and this solely because no pleadings had been filed, asking for contribution.

The District and the Circuit Court of Appeals both held that the right of recovery by the New York must be founded upon some affirmative pleading, and could not be obtained by recoupment or set-off without these. It was the method and not the right that was questioned. It might be said that so far and so much was the court's mind working along established lines of well known remedies, and early methods of securing them, and so strong are these in the most of men at the bar that one might be justified in saying that there could be no *right without writing,* or, to use a homely comparison, the patient must take his remedy out of a bottle, for that is the time-honored way of administering it; better die than break the rule or the bottle. Practice and procedure must be respected even at

the expense of justice or law. The profound respect that these courts had for form and procedure was the foundation of the denial of the right to recover contribution. Not that the right did not exist, or that the court had condemned without reason the New York to pay more than the moiety of the damage, for something she had done or left undone; not for this, but because it had not been properly asked for

The rule of division of damages in admiralty cases was not changed or disturbed, and is today as much a rule of law as it ever was.

Then why should the Circuit Court of Appeals in this case hold that the language referred to in the original case amounted to a decision that one party should be condemned to pay more than the other that was equally at fault for the collision? In this the court erred. The opinion of this court does not admit of this construction; the intention and meaning of this decision is apparent from the authorities cited. These do not hold that there should be unequal division of damages between *tort feasors.* Or that there could not be recovery in an independent suit for contribution; quite the contrary, for the court say, *Juanita*, 93 U. S., 337-338:

> "Whatever their rights may be as against Purseglove, by reason of such payment of more than one-half, must be settled in another proceeding. It cannot be done in this litigation."

This case clearly recognizes the right to recover in another proceeding.

Recoupment is the right whereby mutual demands

which arise out of the same transaction may be adjusted in one action.

Am. & Eng., Vol. 25, 547.

It is of common law origin and independent of the statutes of set-off.

4 Minor's Inst. (2nd Ed.), 706.

1 Chitty, Pl. (16 Am. Ed.), 595.

31 Am. Rep., 775.

8 Viner's Abr., Title Discount, 556.

But may be equity early transposed.

Grand L. v. *Knox,* 20 Mo., 433.

Chitty, Pl., 14 Am. Ed., Vol. 1, *p. 568:

> "At common law, and independently of the statutes of set-off, a defendant is in general entitled to retain, or claim by way of reduction, all just allowances or demands accruing to him or payments made by him, in respect of the *same* transaction or account which forms the ground of action. But this cannot be termed a set-off in the strict legal sense of the word, because it is not in the nature of a cross demand; or a mutual debt, but rather constitutes a deduction, rendering the sum to be recovered by the plaintiff so much less."

It applies to common law and equity. Also admiralty.

Snow v. *Caruth,* 1 Sprague, 324.

Nichols v. *Tremlett,* 1 Sprague, 361.

Defendant not bound to recoup.

Minor's Institutes, Vol. 4, part 1, p. 656.

Burwell v. *Knight,* 51 Barbour, 267.

Jennison Hard. Co. v. *Godkin,* 112 Mich., 57.

Wells on *Res Adjudicata,* 236, 305.

I.

THE RULE OF RES ADJUDICATA.

Upon what is *res adjudicata*, we say:

Van Fleet on Former Adjudications, Sec. 256, says:

> "Unless the defendants contest an issue with each other, either upon the pleadings between them and the plaintiff, or upon cross pleadings between themselves, it will not be *res adjudicata* in a litigation between them. * * * A judgment against them, if there are no issues between them, does not bind them as to each other."
>
> Citing *State Bank of St. Louis* v. *Bartlett*, 114 Mo., 276.
>
> *O'Connor* v. *New York Land Co.*, 28 N. Y., 544.

In *Bulkley* v. *House*, 21 L. R. A., 247, the court said:

> "A judgment against several defendants is not conclusive as between themselves in respect to their rights and liabilities toward each other."

In the case of *State Bank of St. Louis* v. *Bartlett*, the court said:

> "The rule is that, when the parties to a suit were not adversaries under the pleadings, the judgment against them does not conclude either, so as to prevent him from showing in a contest between themselves that the obligations should be borne by the other."

In the case of *Koelsh* v. *Mixer*, 53 Ohio St., 207, an action was brought by a surety on a bond against his co-surety for contribution. Defendant pleaded a former adjudication in a case in which plaintiff and defendant had been parties defendant, and that de-

fendant was released from liability. The Supreme Court would not allow the plea, saying:

> "Whilst the exact limits of the doctrine of *res adjudicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced on the same issues, between the same parties or their privies, standing in adversary character to one another.
>
> "*It is not enough that an issue may have been joined* between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue may have been, it was not in issue between himself and his codefendant, the plaintiff in this action, and could not, therefore, conclude the latter; though parties to the suit they were not such in an adversary character, being simply codefendants to the suit on the bond. * * *
>
> "It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they are adversary parties in the original action."

The opinion in this case contains citations to many pertinent authorities.

In this case, as to the cargo damage the Conemaugh and New York were only co-defendants.

The law applicable to the present state of facts is correctly stated in the case of

> *Cottingham* v. *Earl of Shrewsbury,* 3 Hare, 27.

> "If a plaintiff can not get at his right without trying and deciding a case between co-defendants, the court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiffs does not require

or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be necessary only to the decree the plaintiff obtains."

McCall v. *Carpenter,* 18 Ohio, 297.

Packet Co. v. *Sickles,* 5 Wall., 580.

In the latter case the court (at page 592) says:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se,* in must appear, *by the record of the prior suit,* that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Cromwell* v. *County of Sac,* 94 U. S., 353, it was held:

"In all cases, therefore, where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be *as to the point or question actu-*

ally litigated and determined in the original action, not what might have been thus litigated and determined."

In *Last Chance Mining Co.* v. *Tyler Co.*, 157 U. S., 683, it was held:

> "A former judgment on a different matter of dispute between the same parties is conclusive only as to matters decided and *not as to other matters that might have been decided."*
>
> *New Orleans* v. *Citizens' Bank*, 167 U. S., 371.

In Amer. & Eng. Ency. of Law, 1st Ed., Vol. 21, p. 200, the rule supported by many adjudications is thus laid down:

> "It is not only necessary that every issue should be directly adjudicated upon in order to subject it to the doctrine of *res adjudicata*, but such issues must be definite, clear and certain. No degree of probability will be sufficient. Absence of doubt and presence of certainty is of vital importance."

The rule in the Ohio courts is the same.

In *Love* v. *Trueman*, 10 Ohio St., 45, it was said:

> "Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties to a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined."

In *Porter* v. *Wagner*, 36 Ohio St., 471, it was held that:

> "Where a judgment is relied on as an estoppel, the question *is not what the court might have decided in a former action, but what in fact it did decide, as shown by the judgment.*

> "A judgment is conclusive by way of estoppel only as to facts, without the proof or the admission of which it would not have been rendered."

The utmost that can be claimed in this case is, that the court *might have decided to apportion the loss in this case between the New York and the Conemaugh according to the rule of damages cognizable in admiralty.* The court expressly disclaims this, however, in *Ex parte Union Steamship Co.*, 178 U. S., 317, for it says, on page 319:

> "But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of the *Chattahoochie*, 173 U. S., 540; the *Albert Du Mois*, 177 U. S., 240, this should have been done. This may be so, but it is an entirely new question, and unaffected by the case of the *New York*, and if the court erred in refusing to allow such recoupment the remedy is by appeal and not by mandamus."

This explains the previous decision of the court, which is the one we contend has been most misunderstood by the Circuit Court of Appeals. It dispels all doubt upon the subject that the question of recoupment and set-off, was not considered by the court in the former decision, and therefore that decision could not be held to be *res adjudicata.*

In the subsequent decision, 189 U. S., 363, the court says:

> "The subsidiary propositions are that if one of the offending vessels paid more than half the damages to a third party they may recoup or set off such excess against any claim for dam-

> ages which the other vessel may have, without bringing in the other vessel as a co-defendant under admiralty rule 59, or filing other pleadings than an answer to the libel. * * *"

The court then proceeds to say:

> "And if, under some circumstances, the other propositions could be applied (which is not necessary to decide) they cannot be under the circumstances of this case. The petitioner made no claim for a division of damages upon the original trial of the case."

And farther on in the decision the court says:

> "The New York having been at fault, was responsible to the cargo, *and if as between her and the Conemaugh she have a claim for recoupment, the way is open to recovery.*"

Our conclusion from this decision is that "the way being open," this proceeding is justified, and that the court did not, by this decision, or its previous decision, dispose of this question of a right to recover the excess, and therefore this proceeding is properly brought.

The court having held that both vessels were at fault, and each should bear one-half the damages, can it be said that in any of the prior decisions of this court it denied the right of the New York to claim contribution because that right did not exist? and that although the court said that "the way was open," that it did not thereby mean that any proceeding in any other court could be taken to recover the excess of the New York's contribution? What did the court mean by that expression if it did not mean that the owners of the New York could recover in a separate proceeding what was denied them in

the former cases because of the absence of the necessary pleadings?

II.

THAT THIS IS NOT A MARITIME CAUSE OF ACTION AND THEREFORE NOT WITHIN THE JURISDICTION OF THE ADMIRALTY COURT.

In all of the efforts that were made to induce the District Court, and the subsequent Appellate Courts to permit the libelant here to offset and recoup the amount for which this libel has been filed, the proctor for the Conemaugh, with energy and enthusiasm, insisted that the libelant had not invoked the provisions of Admiralty Rule 59, of this court, and therefore was not in court so as to be entitled to demand affirmative relief against the Conemaugh for any part of the damages paid to the insurers of her cargo.

If the New York, therefore, had the right under Rule 59 to pray for and obtain process against the Conemaugh, so that it could have recovered from the Conemaugh in the former proceeding, then certainly the right exists to proceed under an original proceeding like this.

Prior to the adoption of Rule 59 there was no rule or process which permitted a third party to be brought into a proceeding in admiralty as a co-defendant by a defendant, and there was therefore no other way open to proceed, but in an original proceeding, by filing a new libel. The rule is not compulsory.

Even under Rule 59 it is not always possible to obtain service of process upon the third party, and it might be necessary to proceed against such third

party in another district. In such emergencies a new suit is the only way to reach the other party. It certainly is not in harmony with the broad and liberal equitable principles which prevail in a Court of Admiralty to turn a suitor away from its forum to obtain relief for a liability which was laid upon him in a Court of Admiralty, especially when all subsequent proceedings relate directly to the same matter, which is of substantially the same character, involving the same parties that were involved in the former admiralty proceeding, with no change of ownership of the vessel.

The case of *The Mariska,* 107 Fed. Rep., 989, is directly in point. In that case the owners of the Helena filed their libel against the steamers Jay Gould and Mariska for the loss of the Helena. No service was had on the Mariska, and the Gould being alone in court, was condemned to pay the entire damages sustained by the Helena. The owner of the Gould thereupon filed its libel against the Mariska for contribution. It was contended on behalf of the Mariska in that case, as it is here, that the cause of action was not maritime because the liability arose out of the payment of a decree, and not out of the original collision. The court, however, found that a right of action existed for contribution and that the Admiralty Court had jurisdiction. It seems to us that this decision is clearly in point and the Circuit Court of Appeals bas so held. In that case the court say:

> "The fundamental equitable principle is to equalize the burden among those who should bear it. *The North Star,* 106 U. S., 17. The supposed difficulty arises only when one of the

offending vesels is not a party to the proceeding in which fault is adjusted. In such case it is not possible for the court to adjust the equities or to decree contribution. Does the right of contribution, therefore, fail? Can it be that the law is incapable to furnish a remedy for the recognized right? Will it be permitted, as at common law, to one uninjured by the wrong of two or more to hold one for the injury and to absolve the others? We can not think the Courts of Admiralty are so weak and so limited in power that they can not find means to enforce a recognized right."

The court then cites from the case of *The Hudson*, 15 Fed. Rep., 162, in which Judge Brown says:

"In effect, while the libelant has a maritime lien upon each vessel *in solido* for his whole damage, so that both are liable jointly and severally as principals, yet as between themselves the several vessels liable are virtually in the situation of sureties for each other for the payment by each of one-half of the damages, and each vessel, like other surties in equity, has such a legal interest in the libelant's enforcement of his lien upon the other that the court must, by its decree, carefully protect this interest whenever the parties are before it, and on failure to do so its decree will be reversed. From this well settled recognition and enforcement of a right of contribution as a substantial legal right, when the parties are before the court, it would seem to result necessarily that, if only one vessel is sued, where another is equally liable, *either an independent suit for contribution must be allowed to the latter (former?)*, or else the other vessel must be brought into the original cause, if that can be done without any substantial injury to libelant. It would be a gross anomaly to say that the court must, by its decree, recognize and enforce a right of apportionment between several vessels defendant, if they all hap-

> pen to be parties, but yet has no power to bring in one of them if absent, or to afford a several remedy against it."

Analogous to this case in principle as to its character being maritime, and if so carying with it a lien, we have the cases arising in general average. General average contribution is defined in Benedict's Admiralty, Sec. 295, as follows:

> "The subject matter of a demand for contribution being maritime, it is clearly a case of admiralty and maritime jurisdiction, and the court may resort to such of its modes of preceeding as may be appropriate to give the relief. If the demand be a lien upon any property within the rule of the court the proceedings may be *in rem*. If the party liable to pay them is within reach of the court the proceedings may be *in personam*."

In the case of *Dupont* v. *Vance*, 19th How., 162, the court say:

> "On full consideration we are of opinion that where cargo is lawfully jettisoned its owner has, by the maritime law, a lien on the vessel for his contributory share of the general average compensation, and that the owner of the cargo may enforce payment thereof by proper proceeding *in rem* against the vessel or against the residue of the cargo, if it has not been delivered."

That was a case of jettison of a part of the cargo, and a libel filed against the brig Ann Elizabeth for contribution to this loss by jettison.

If the owner of a cargo jettisoned has a lien upon the vessel or the remainder of the cargo for contribution, then in case the cargo so compelled to contribute should seek to file a libel against the vessel

to recover back money paid because of a negligent stranding of the vessel which gave rise to the jettison, we would then have a case parallel to the one at bar. Could there be any doubt as to the jurisdiction of a Court of Admiralty in such a case, although the cause of action and the damage was due to the payment of the contribution, and not to the negligent stranding, the latter being merely a prior or remote cause, which made necessary the jettison and consequent contribution?

In the case of *Wellman* v. *Morse*, 76 Fed. Rep., 573, decided by the Circuit Court of Appeals for the First Circuit, the court reviews many of the prior decisions on the subject of the lien for contribution and unqualifiedly holds, that there is such a maritime lien, although in England the law is different.

In the case of *Ralli* v. *Troop*, 157 U. S., 400, the court say:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship (or, in his absence, the master as his agent) has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved and remaining in his possession for the amount due in contribution to the owner of the ship, and the owner of goods sacrified has a corresponding lien on what is saved for the amount due to him."

The case of *The Irrawaddy*, 171 U. S., 187: In that case the owners of the Irrawaddy filed a libel against the owners of her cargo for a contribution for expenses incurred in the nature of general average for saving the vessel and her cargo which had

been stranded. No question was raised as to the jurisdiction in that case. The amount to be recovered from the cargo was on account of expenses actually paid, although incurred for saving the vessel and cargo. It might have been argued in that case, as it is in this, that the origin of *the cause of action was the payment of money,* and therefore a case at common law for money expended, and not maritime or within the admiralty jurisdiction.

See, also, *The Dora,* 34 Fed. Rep., 343.

The case of *The Wm. Murtagh,* 17 Fed. Rep., 259, is in point. In that case the owner of the canal boat Stackpole filed a libel against the tug Murtagh for the loss of the canal boat and her cargo. Subsequently the owner of the Murtagh arranged with the owner of the cargo that if he would make no claim in the libel, and would abide the event of the suit for the damages to the Stackpole that he (the owner of the Murtagh) would pay any liability that the court found against the latter. The court held that the Murtagh and the canal boat were both at fault for the loss of the cargo and the canal boat, whereupon demand was made upon the owner of the Murtagh for one-half of the value of the canal boat's cargo. Payment was refused and the owner of the cargo filed a libel *in rem* against the Murtagh, based upon the agreement to pay. The court held that after a stipulation is given in a suit *in rem* it stands in place of the vessel released by it, and she cannot be again seized for the same cause of action. Yet, notwithstanding this, the court held that the Murtagh could be proceeded against *in rem* a second time because of the terms of the agreement made with the owner. The cause of action, therefore, was based in the first

instance upon the agreement, but as it referred to a collision damage it was maritime, and the court allowed the suit to be maintained.

In every maritime transaction, whether of *tort* or *contract*, coming within the jurisdiction of an Admiralty Court, if property is concerned a lien is provided, the principal, if not the only exception to this rule being the case of home supplies, and even in this class of cases a lien, if provided by any law, is recognized and enforced in admiralty. *J. E. Rumbell*, 148 U. S., 1.

In the case of *The N. J. S. N. Co.* v. *Merchants' Bank*, 6 How., 344, Mr. Justice Nelson says:

> "If the cause is a maritime cause subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. It must in its nature be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance."

In this case there is also a review of the authorities upon the question of the source and extent of the admiralty jurisdiction of the United States, the question coming up because it was contended that a contract of carriage made on the land was not one within the admiralty jurisdiction.

It has been held that a lien in admiralty may be assigned and enforced in the name of the assignee.

> 19 Am. & Eng. Ency. of Law, 1136, and cases cited.

Taking a bill or note does not extinguish the lien or claim for which the note was given, unless it is so understood. The note is surrendered at the trial.

19 Am. & Eng. Ency. of Law, 1133, and cases cited.

Money borrowed to pay bills stands in the same relation to a vessel as the bill paid.

The Cumberland, 30 Fed. Rep., 449.
The Arctic, 75 Fed, Rep., 601.
The Wyoming, 30 Fed. Rep., 493.
S. Bank v. *Alex McNeill*, 22 Fed. Cas., 13,186.

These are all cases in which the original debt was merged in some other obligation, like a note or a loan, and yet the court recognized the transaction as maritime and within its jurisdiction.

The maritime character of the transaction, arising as it does directly out of a maritime collision, liability is not changed by the payment of the money, nor does it change the forum in which the controversy is to be tried.

III.

THE CLAUSES IN THE BILL OF LADING.

It was claimed in the District Court that certain clauses in the Conemaugh's bill of lading issued to the shippers of her cargo, precluded the right of the latter to maintain a suit against the Conemaugh or her owner for loss or damage to her cargo. This being so, the New York could not recover of the Conemaugh now, what the shippers or their underwriters could not have recovered of her. The Conemaugh not having been liable to her shippers, the New York cannot now hold her for contribution. These defenses were set up in the Conemaugh's answer, and urged at the hearing in the District Court

and passed upon adversely by the District Court.

The appellant in the Circuit Court of Appeals, and respondent or appellee here, did not file assignment of errors, as to the ruling of the District Court, in failing to recognize the defenses contained in the Conemaugh's bill of lading.

Three defenses were urged in the District Court:

First. That no notice in writing had been given by the shipper within 30 days of the date of the loss, as required by the terms of the Conemaugh's bill of lading.

Second. That no action had been brought by the cargo owners for damages, within 3 months of the loss, as required by the bill of lading.

Third. That the Conemaugh was entitled to the benefit of the shipper's insurance under a clause in the bill of lading, which provides that the carrier shall have any insurance and all benefit and advantage to be derived therefrom.

The District Court passed upon these defenses, saying (record, 44):

> "If the libelant was compelled to pay damages for cargo losses, by reason of negligence to which the Conemaugh contributed, as was held by the Supreme Court, then it is of no consequence whether the Conemaugh was liable to her cargo owners or not, and she must be held to be liable for one-half the damages caused by her negligence jointly with that of libelant."

The District Court therefore considered these defenses, and held against them. No assignment of errors was filed as to this action of the court. The record shows that the assignment of errors includes no reference to these defenses. Unless, therefore,

this court chooses to notice errors under its rule the owner of the Conemaugh cannot now be heard upon these propositions.

Grape Creek Co. v. *Farmers' Loan & T. Co.*, 63 Fed. Rep., 89.
Randolph v. *Allen*, 73 Fed. Rep., 23.
Cars Co. v. *Gibson*, 107 Fed. Rep., 365.
U. S. v. *Penna.*, 175 U. S., 500.

Fearing, however, that they may be urged, and the court may consider them we will answer them in their order.

A. *Notice of claim must be given in writing by the shipper of damage to cargo within 30 days after the occurrence of the loss.*

The collision occurred on the 21st day of October, 1891.

On the 11th day of November, 1891, the appellant as the owner of the Conemaugh, and as bailee or trustee of the owners of her cargo, filed its libel against the New York, not alone to recover the damages sustained by the Conemaugh, but to also recover the damages sustained by the owners of her cargo.

Thereby, within less than 30 days after the occurrence of the loss, recognizing that there was a loss to the shipper, and that he was entitled to recover for it, and that it would undertake to see that it was recovered for him. Here we have the carrier recognizing the damage of the shipper, acknowledging it and taking steps to recover it from a third party. It must therefore be estopped by this act from taking the position that it had not had notice of the claim for damages. The object of the notice of a loss

under a bill of lading is to apprise the carrier of the fact that there is loss or damage, so that he may protect himself by early steps to investigate before the evidence has disappeared or be difficult to obtain.

These reasons for the rule are well stated in the case of *Southern Exp. Co.* v. *Caldwell*, 21 Wall., 264, in which Mr. Justice Strong says:

> "The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. * * * They may carry, they often do carry, hundreds, even thousands, of packages daily. * * * If a bailor may delay giving notice to them of a loss or making a claim indefinitely, they may not be able to trace the parcels bailed and to recover them, if accidentally missent, or if they have, in fact, been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge, with the bailee it is one of mutitude."

Stipulations in bills of lading require that notice of a loss or damage be given within a stated period, can be waived expressly, or the waiver may be implied from conduct inconsistent with the intent to rely upon the stipulation.

> 5 Am. & Eng. Ency. of Law., 323, and cases cited.

The carrier is estopped from denying the sufficiency of a notice which he had received after the expiration of the time for giving it.

> *Merrill* v. *Am. Ex. Co.*, 62 N. H., 514.

A clause requiring a notice within forty days was held waived because of a promise to pay plaintiff's

claim if made for a reasonable amount, and in this way induce him to delay bringing suit.

Gulf, C. & S. F. Ry. Co. v. *Trawick,* 80 Tex., 270; 15 S. W., 568.

To the same effect are the following cases:

Galveston, H. & S. A. Ry. Co. v. *Seligman,* 23 S. W., 289.

Galveston, H. & S. A. Ry. Co. v. *Kelley,* 26 S. W., 470.

Here the carrier knew and recognized the claim, and by incorporating it with its own, in a libel against the New York, estopped itself from claiming that it had no notice of the loss in writing because it put it in writing when it set it up in its libel against the New York. It practically made out its own notice. It waived any further notice, because it already had and admitted it had full notice of the claim.

B. *The action for damage to cargo must be brought within 3 months after the occurrence of the loss.*

The argument as to the notice applies to this point. The appellant waived the bringing of the action against it because it brought its action for this cargo damage itself, by filing the libel against the New York. After the first decree against the New York in the District Court it made the necessary proof and recovered more than half of this cargo damage by the decree of the District Court which was subsequently reversed.

How can it now say that no action was brought to recover this damage?

Whatever may be said of the reasonableness of the

rule which compels the person damaged to bring action within three months after the damage occurred, it would be unreasonable to permit such a rule to defeat a claim through the act of the carrier himself, who did for the injured person that which the injured person should have done for himself and then, using its own acts to defeat a clear right of action. Suppose that at the expiration of four months after the loss, the owner of the Conemaugh had dismissed so much of its claim for damages against the New York as embraced the claim for cargo damages. As it was not compelled to bring an action for the cargo, it clearly had a right to refuse to go on with it. Would this clause in the bill of lading in that case defeat the right of the shipper to sue the Conemaugh or her owner for the damage? Would not the carrier have been estopped from taking such a position, or, in other words, would the clause be held reasonable and valid under such circumstances? If not, how can it now be held to be valid as against this libelant? Besides, the New York is not suing here as the shipper and is not bound by the terms of the bill of lading. The defense is not available against the New York in this suit.

C. *The carrier is given the benefit of the shipper's insurance.*

The most important of these defenses in this case is, that there was in the bill of lading under which the cargo of the Conemaugh was carried a clause which reads as follows:

> "And the person or party liable who might sustain loss in consequence of owning * * * or being interested in or as to such vessel, shall

have any insurance, however, effected on, as, to or covering the property lost or damaged, and all benefit and advantage to be derived therefrom."

It is contended that the case of *The Phoenix Ins. Co.* v. *E. & W. Trans. Co.*, 117 U. S., 312, as to this clause is decisive. In that case the propeller Merchant, belonging to the appellants in this case, took on a cargo of grain at Chicago shipped by the firm of A. M. Wright & Company, under a bill of lading which contained this clause:

"And the carrier so liable shall have the full benefit of any insurance that may have been effected upon, or on account of said goods."

The Merchant was negligently stranded near Milwaukee, damaging the cargo, which was insured by the Phoenix Insurance Company, and the latter, after paying the loss to the shipper, brought suit against the carrier. The court in that case held that the carrier was entitled to the benefit and advantage of the insurance effected by the shipper, and inasmuch as the shipper had been paid he had therefore no right of action against the carrier, and the insurer could not recover, because he took nothing from the shipper by subrogation.

This case was followed in the case of *Inman* v. *South Carolina Railway Company*, 129 U. S., 128, and in *Wager* v. *Prov. Wash. Ins. Co.*, 150 U. S., 108.

It is therefore contended that inasmuch as the owners of the cargo of the Conemaugh having been paid their losses by the insurers, had no right of action against the Conemaugh to recover damages to the cargo (because of this clause in the bill of lading) and therefore the libelant here (the owner

of the New York) could not recover in this suit because the insurers could not, and therefore what could not be directly done by the shipper or his insurer can not be done indirectly by the owner of the New York. In other words, the New York took nothing by subrogation, and therefore cannot maintain this suit.

In answer to this proposition we have to say that the right to recover in this case is not one resting upon the right of subrogation, but upon the right of contribution. In numerous cases the Courts of Admiralty have held, that there is a right of recovery even when no direct action could be sustained by the shipper against the carrier. Subrogation is therefore not the rule in such cases.

The North Star, 106 U. S., 17.

This was a collision betwen the steamer North Star and the steamer Ella Warley, which resulted in the total loss of the Warley. Both vessels were held at fault, and the damages were to be equally divided. The owners of the Warley raised the point that under the Limited Liability Act of 1851, the Warley having been lost in the collision, the liability ended and the owners of the North Star could not recover from the owners of the Warley any part of their damages, and for that reason they could not deduct one-half of the North Star's damages which the Warley was to pay from the half of the Warley's damages which the North Star was to pay. The court, however, held that there must be deducted from the amount awarded the Warley a moiety of the damages sustained by the North Star. In this connection the courts say, speaking of the decision

of *Chapman* v. *Netherlands Company,* decided in England, if applied in this country:

> "It would enable the owners of the Ella Warley to obtain full compensation for a moiety of their loss, whilst the owners of the North Star would have to sustain both their own entire loss and one-half of that of the owners of the Ella Warley, whilst both vessels were alike to blame for the collision. *A rule which leads to such results can not be a sound one.*"

So here, although each of the steamers should bear one-half of the loss, it is now sought to throw all of it onto the New York.

On February 13, 1893, Congress passed an act known as the Harter Act. The first two sections of this act prohibit the introduction in any bill of lading of any clause which limits the liability of the carrier for losses or damages arising through negligence of itself or its servants, and in the third section of the act the carrier is released from any liability for loss or damage to the cargo, if due diligence has been used to make the ship seaworthy and to select a competent crew to navigate her.

Under this act such a clause as is found in the Conemaugh's bill of lading would be a violation of the law, and would subject the Transportation Company to the payment of a fine, besides making void the bill of lading itself.

Since the passage of this act this court decided the case of *The Irrawaddie,* 171 U. S., 187. In that case the Irrawaddie was negligently stranded, and the owner of the vessel in recovering her and her cargo incurred expenses which, under an adjustment in general average, would be borne jointly by

the vessel and cargo according to the value of each. In this way the owners of the vessel had a claim against the cargo for contribution for these expenses incurred in saving the vessel and cargo, which they sought to collect, contending that the negligent stranding was due to the negligence of the master and crew, and under the Harter Act the owners of the ship could not be held liable for any damages the cargo might have sustained and for that reason, being exempt from all liability, the stranding was the same as if it had occurred without negligence, and that, therefore, the owners had a right to call on the cargo for its proper contribution. The defense on the part of the cargo was that the vessel had been negligently stranded, and that, therefore, the cost of releasing her must fall upon the ship, and that the cargo could not, because of the negligence of the carrier, be called upon to contribute.

This defense by the cargo owner had, prior to the Harter Act, been a good defense, and the court held that it was still good, and that, notwithstanding the Harter Act, the ship must bear the consequence of its negligence under the circumstances, and the cargo was not liable, and need not contribute.

The Chattahoochie, 173 U. S., 540.

In this case the steamer Golden Rule was sunk by the steamer Chattachoochie, and, together with her cargo, became a total loss. The court found both vessels at fault and divided the damages. The Chattahoochie paid all of the Golden Rule's cargo damage, and then was permitted to recoup one-half of this against the amount which the owners of the Chattahoochie were to pay on account of the value of the Golden Rule.

The point was made in that case that under the Harter Act the owners of the Golden Rule were not liable in any way for any part of the loss of the Golden Rule's cargo, and not being liable, the amount which they were to recover for the damages to the Golden Rule should not be reduced by deducting therefrom the damage to the Golden Rule's cargo. The court, however, followed the decision in the case of the North Star, and allowed recoupment, affirming the decision of the Circuit Court of Appeals for the Second Circuit, found in 74 Fed. Rep., 899.

Judge Brown, in the case of *The Viola*, 80 Fed. Rep., 296, referring to the Harter Act and this phase of it, says:

> "On the other hand, there is not the least indication in the Act above named that it was the intention of Congress *to relieve the carrier vessel at the expense of the other vessel in collision cases; that is, to increase the liability of the latter beyond her former liability under the circumstances.* Such a result is not only plainly outside the scope of the Act, but would be in itself so unjust that the third section of the Act ought not to be so construed or applied as to work that result. * * * If that is the design of the Act it would be incompatible with it to permit the cargo owner to turn upon the other vessel to recover what the Act disables him from recovering from his own, to the increased detriment of the other vessel. * * * Consistency, therefore, requires that the extent of the liability of the other vessel, as fixed by the previous law, should remain unchanged."

The Harter Act, as was said by this court in the case of *The Irrawaddie, supra,* was passed for the

purpose of giving the American ship owner the advantages which the English and other ship owners had, when, under their law, they were permitted to make contracts which relieved them from liability for cargo damage in case of the negligence of the master or crew. Under the American law the owner stood liable for the negligence of his master and crew, notwithstanding such clauses, and, by the Harter Act he was prohibited from introducing clauses which limited his liability against his own and his crew's negligence, and the clause in this bill of lading could not now be introduced because contrary to the first section of the Harter Act. Congress, then, by express enactment, relieved the vessel owner from liability, so that we have a statute taking the place of the favorable English contract, and at the same time prohibiting the contract. If, then, the carrier must now, under the decisions of the court in *The Chattahoochie* and *Irrawaddie* cases, respond under circumstances similar to those in this case, how much greater is the reason for calling on him to respond when he has sought to exempt himself by a clause in the bill of lading issued to the shipper, and of which the owners of the New York in this case could not have read, and had no notice of.

Can the owners of the Conemaugh now increase the burden of the New York by resorting to the terms of a contract which was, so far as the New York is concerned, a secret one?

If an express enactment by Congress, of which everyone is bound to take notice as the law, does not relieve him from liability, how can it be said that the secret agreement between the carrier and the

shipper could do so? An agreement of which the New York owners could have known nothing, and which they could not plead to relieve themselves of liability, when called upon to pay by decree.

The agreement has no greater force than the statute. *The North Star* case was decided before this bill of lading was issued. That was the first case in which the principle was laid down that a limited liability act would not relieve one of the *tort feasors* from contribution. That was then and is now the law of the land, and everybody was bound by it. The appellant here, therefore, could not contract, in the face of this decision, so as to increase the burden of a *tort feasor* liable with it for damages.

The New York has been compelled, by the decree of the court, to pay, and it ought not now to bear the whole of the burden when, by law and by the decision of the court, one-half of it should be borne by the Conemaugh, when her only defense lies in a secret agreement between her and her sihpper.

The case of

The Albert Dumois, 177 U. S., 240.

In that case there was a collision between the steamer Albert Dumois and the steamer Argo, resulting in the loss of two lives and serious damage to the Argo. Both steamers were held at fault, and the court decreed that the owner of the Argo could recover one-half of her value, less one-half of the value of the damages sustained by the Dumois, and a sum which was paid by the owner of the Dumois to the representatives of the deceased passengers of the Argo. The contribution was allowed.

Justice Brown based the decision upon the de-

cisions of the court in *The North Star* and *Chattahoochie* cases. There was the further complication in this case that under the maritime law and the laws of Louisiana there was no lien on either vessel for the injuries resulting in death; yet, notwithstanding, this contribution was allowed.

The Geo. W. Roby, 111 Fed. Rep., 601.

In this case, by reason of a collision between the steamer Roby and the steamer Florida, the latter was sunk and with her cargo became a total loss. The owners of the Roby limited their liability to the value of the Roby, and on the trial of the case the court held both steamers at fault. The value of the Roby was not sufficient to pay one-half of the damages sustained by the Florida's cargo, and therefore a contest arose between the owners of the Florida and the owners of her cargo, each claiming the value of the Roby (which was less than half the amount of the damages). In this contest the owners of the Florida contended that the bill of lading which was given to the owners of the Florida's cargo *contained a clause similar to the one now found in the Conemaugh's bill of lading, giving the carrier the benefit of the shipper's insurance.* The shippers of the Florida's cargo therefore could not proceed against the Florida, as they had received their indemnity from the insurance companies, and it was therefore contended that their insurers ought not to be preferred and paid out of the Roby's proceeds until after the value of the Florida had been paid.

In this case, on page 621, the court say:

> "The right of recoupment, which we hold to exist in favor of the Roby, by which one-half of the decree against her cargo lost on the Florida

> has been set off against the decree against the Roby for one-half the value of the Florida, does not depend upon the liability of the Florida for cargo damages, but rests upon the liability of the two colliding vessels to bear equally the burden resulting from a collision due to their mutual fault. In other words, *the right of recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other.*"

The claims of the cargo were preferred and the decision of the District Court affirmed.

This case is directly in point. Judge Swan rejects the claim that because the cargo owner had, by contract with the carrier, released the latter from all liability if insured, no claim for recoupment could be made in case of collision.

It all comes to this: If, under the Limited Liability Act of 1851 and the Harter Act, the carrier is not released when it comes to a matter of recoupment and contribution, how, then, can such a release be claimed under a contract with the carrier, when such a release would amount to making one vessel jointly at fault with another, bear the entire burden of the loss? *This is contrary to law, because, when both vessels are at fault, both vessels must share the loss.* This is a rule of law and property; it cannot be set aside or nullified by a contract and bind persons not party to the contract, as it is claimed in this case.

It is said in *The Germanic,* 124 Fed. Rep., 1, that the Harter Act must be strictly construed. This means that nothing shall be given it by implication; thus this contract must be also strictly construed,

and what it releases should not and could affect the rights of those not a party to it.

If, then, the Harter Act does not release the parties in case of collision damage, this contract should not.

IV.

CONTRIBUTION.

The right of the libelant to recover here is based upon the right of contribution, a well known principle in use in admiralty cases. The definition of subrogation we find in Vol. 27, Amer. & Eng. Ency. of Law, page 202, to be as follows:

> "Subrogation is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities."

This principle does not apply, because the recovery here is not the recovery of the owners of the cargo. The libelant is not taking their place and recovering in their right. This, therefore, is not the rule or the doctrine which should be applied. Having been compelled to pay more than a moiety of the damages it sues in its own right. The loss should be borne by both vessels; this is a universal rule of law, and under it each is to pay one-half of the damages. Under it, when all the parties are before the court, *all the damages* are so apportioned—cargo damage as well as the damages to the vessel herself. Recoupment is allowed in all cases, and the damages are equally divided. The New York having paid more than her share is, in equity and good conscience, entitled to be reimbursed for this share.

The rule which does apply and which controls this case is the rule of contribution. It arises in this class of cases in admiralty only. At common law contributory negligence defeats the right of action. In admiralty it does not, but entitles the party guilty of negligence to recover if negligence can be proven against the opposite party. In such a case a plaintiff recovers one-half of his damages.

The rule of division of damages has been well settled by numerous decisions in this country, which may be found in the case of *The Atlas,* 93 U. S., 302.

In the case of *The Alabama and Game Cock,* 92 U. S., 695, the court entered the following decree:

> "The Alabama and the Game Cock, and the respective stipulators severally each for one moiety of the entire damages, interest and costs so far as the stipulated value of the said vessel shall extend, and any balance of such moiety over and above such stipulated value of either vessel on which the libelant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel."

In this case the libelant was unable to recover one-half of the damages, because the value of the Game Cock was $10,000, which was some $30,000 less than a moiety of the decree against her, so that the Alabama became liable for the major part of the damages. This decision was in direct conflict with the decisions of the English courts in *The Milan,* Lush. Ad., 401, in which case the libelant obtained a decree against each of two vessels for one-half, and if unable to recover it was his loss and did not increase the burden of the co-wrongdoer.

These cases have been followed by numerous decisions since, and plainly recognize the equitable doctrine of contribution, for the foundation of which in courts of common law and chancery we find the early case of *Dering* v. *Earl of Winchelsea*, 1st Cox, 318. This was a suit brought by one surety on a bond against his co-sureties, and in it we find the court saying, on page 321:

> "If we take a view of the cases, both in law and equity, we shall find that contribution was bottomed and fixed on general principles of justice and does not spring from contract. (*Swain* v. *Wall*, 1 Cha. Rep., 149.)
>
> "The doctrine, however, is best defined in the case of *Boardman* v. *Page*, 11 N. H., 431, in which the court, on page 438, says:
>
> " 'The rule of law, then, would seem to be that when one of two or more co-promisers, without assuming any new ground of liability, still continues liable on the original contract to the promise, and is lawfully compelled, by virtue of such contract, to pay the debt, or discharge the original liability of all the co-promisers to the promisee, in such case the equitable liability of the other co-promisers, for contribution of their fair proportion, will still remain, notwithstanding any contract of the promisee for the relief of such other co-promisers, and notwithstanding they may be discharged by the operation of the statute of limitations from that liability to the promisee.' "

In this case the plaintiff sought to hold one other co-maker of a promissory note, and one of the defenses of this maker was, that he had a perfect defense as between himself and the holder of the note and, therefore, the latter could not have recovered a judgment against him upon the note. Upon this proposition the court, on page 435, says:

> "Whatever might have been the nature of the defense set up by the defendant, and which prevailed as against the holder of the note, it is apparent it was not of a character to release the plaintiff from his liability. *And we think it was immaterial what might have been the defendant's ground of defense since it did not avail the plaintiff also; whether it might have rested upon the contract of the payee or upon the statute of limitations.*"

This recognizes that whatever personal defense there may have existed between the holder of a note or bond as against the defendant who is asked to contribute, does not avail him as a defense when called upon to contribute. In other words, he might not be made to pay directly, but could be compelled to contribute to payment when that payment was made by another who had no such defense.

The discharge of a surety from his principal obligation without discharging him from sureties, will not relieve him of his liability to them for contribution.

Campbell v. *Bostwick*, 20 Ohio St., 337.

41

In this case it was held that since the right to contribution among common sureties was not founded on the contract of suretyship, but is based on an equity arising from the relation of co-sureties, the discharge of a surety by the neglect of the creditor to sue until the claim against the latter is discharged by the statute of limitations, does not release such surety from his liability to contribute to a common surety who has paid more than his share of the debt.

Chipman v. *Todd*, 60 Me., 282.

It is not a bar to the maintenance of a suit against

a co-surety that plaintiff in a previous suit had abandoned an attachment against the property.

Pin Hill Coal Company v. *Harris,* 7 Ky., 519.

> "One of several joint obligor owners has a right to demand from his co-obligors, the moment he pays a debt, even though his co-obligors have been protesting that no payment shall be made, and this right is assignable in equity."

The same was held to be true also in the case of *Catskill* v. *Messenger,* 9 Cowen, 39.

In *Durrell* v. *Wendell,* N. H. Rep., 360, and a number of other cases cited in the case of *Boardman* v. *Page, supra:*

This case has been followed by the Appellate Court of Illinois in the case of *Byers* v. *Alcorn,* 6 Ill. App., 39, and also in *Drummond* v. *Yager,* 10 Ill. App., 380. In this case, on page 382, the court says:

> "The obligation of contribution is not founded upon contract, but on a principle of equity; and now the principle is universally acknowledged. Any persons acting under circumstances to which it applies are said to act under the head of contract implied from the universality of the principle, and upon this ground stands the jurisdiction assumed by the courts of law."

The remedy of contribution was of equitable origin and rests on equitable principles. After it had become firmly established in equity, the courts of law took jurisdiction on the ground of an implied contract arising from the equitable obligation, and the courts of law, along with the jurisdiction, have taken the maxim that equality is equity.

In the case of *Chipman* v. *Morrell*, 20 Cal., 135, Field, Chief Justice, says as follows:

> "The equitable doctrine, in progress of time, became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge; and consequently upon a mutual understanding that if the principal failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed jurisdiction to enforce between the sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss. * * * This jurisdiction of the common law courts did not, however, impair the concurrent jurisdiction of equity. Indeed, in many cases, especially where the sureties were numerous, and some of them insolvent, or where some of the sureties had died, courts of equity were alone adequate to afford complete remedy."

In 7th Amer. & Eng. Ency. of Law, page 331, we find:

> "The right is regarded as resting not on the original contractor, but on the relation created thereby of the parties bound by a common obligation and the contract implied therefrom of discharging such common obligation equally."
>
> Citing numerous cases.

Another evidence that the right of contribution does not grow out of the contract, but is based upon the equitable principle of bearing a loss equally with another, is the fact that the statute of limitations does not begin to run until the plaintiff has paid more than his share of the debt. This is announced in 7th Amer. & Eng. Ency. of Law, and supported by a long line of cases beginning in England with

the case of *Wolmeshausen* v. *Gulleck,* 2 Ch. Rep., 514, and followed by the decisions of many states of the United States.

The right of contribution not having begun until the decree in this case was paid by the libelant, there was no right of action until then, and since then the statute of Illinois, limiting rights of action to five years, has not begun to run, and this defense, therefore, is not available to the appellant.

The libelant is entitled to recover the moiety paid, with interest thereon from the date of payment.

Moore v. *Bruner,* 31 Ill. App., 400, and cases cited on page 344 of Amer. & Eng. Ency. of Law.

It may be contended that the doctrine of contribution applies only to relations arising out of a contract, and that there is not contribution between *tort feasors.* Our reply to this is that while we find it frequently stated that there is no contribution between *tort feasors,* this is not by any means, a universal rule, and we find that this rule applies only to cases of intentional and conscious wrong doing, but does not apply to cases which are committed without guilty intent.

In the case of *Bailey* v. *Bussing,* 28 Conn., 455, where the owner of a stage coach sued the driver for contribution and recovered, Judge Ellsworth reviews the English cases and says:

> "A guilty trespasser, it is said, can not be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act which is apparently correct

> and proper, the rule will change with its reason and he may then have an indemnity, or as the case may be, a contribution. * * * The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of mere relation to the perpetrator of the wrong, the maxim of the law that there is no contribution among wrong-doers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers and the like."

See numerous cases cited 7th Amer. & Eng. Ency. of Law, 365.

This court has recognized the equity of the principle of contribution between wrong-doers in the case of *Selz* v. *Leopold,* 6 Wall., 327, in which it is said:

> "Equal contribution to discharge a joint liability is not inequitable even as between wrong-doers, although the law will not in general support an action to enforce it where the payments have been unequal. *Merryweather* v. *Nixon,* 8 T. R., 186; *Bailey* v. *Bussing,* 28 Conn., 455. Where the liability is joint equal contribution is just, and it would afford the complainants no ground of relief if it appeared that the arrangement with the marshal was such as is alleged in the bill of complaint."
>
> *Ankeny* v. *Moffett,* 37 Minn., 109.

In this case it was held that a person was not deprived of contribution from another also originally liable, where the grounds of their liability is

simply negligence on the part of each in passing on some lawful business.

Horbach v. *Elder,* 18 Pa. St., 33.

In this case five persons were engaged in running a line of stages for certain portions of which stage drivers and horses were to be provided by each, with his exclusive experience, and with his exclusive control of the same. The stage was overturned by the negligence of one of the drivers and several passengers injured. Suits were brought by one of the proprietors and process served on the one only who employed the driver, and one other, and the latter paid about one-half of the liability. It was held that he ought to recover from one of the other proprietors on whom notice had not been served, his proper share of the amount so paid.

Armstrong County v. *Clarion County,* 66 Pa. St.

In this case a traveler recovered damages against a county for injury received. The cases demonstrate that there is in many cases contribution among *tort feasors.*

The rule that there was no contribution among *tort feasors* does not apply to admiralty, because there there is contribution.

In England in the case of *The Frankland,* 9 Asp. M. Cases, 196, in an admiralty case, this principle was recognized. It was a case in which two vessels were held at fault for a collision. One of them had paid damages to a third vessel, and sought to recover one-half of the sum so paid of the other. It was contended that there could be no contribution among *tort feasors,* but the court held that the rule

of division of damages in admiralty must be consistently enforced, notwithstanding the rule at common law, and recovery was therefore allowed.

We base our right to recover here upon the fact that we paid the entire damage to the Conemaugh's cargo. Under the well-settled rules of law one-half of the damages arising out of the collision should be paid by the Conemaugh. The New York, therefore, has paid more than her share, and insists now upon contribution, and, further, that the respondent here can not defend by setting up a defense under the clause of the bill of lading, even though this would operate to discharge the Conemaugh in a suit by the cargo owners against her.

The right of contribution being an equitable right and not arising out of the contract is an independent right, and a suitor has as much a right to invoke it in an admiralty as in a chancery case. In principle it should be as much enforced in an action of *tort* as in one arising out of a contract. That equality is equity is as true in the one case as in the other, and works out justice alike in both. The equitable powers of a Court of Admiralty are particularly well adapted to do this. In this case it is just and right that the Conemaugh contribute her legal share of the sum paid by the New York. This is no hardship.

It is equity and justice.

In this case the Circuit Court of Appeals has held that the admiralty courts had jurisdiction of this case, and that there was a right to claim contribution. It held, however, that all questions as to recovery had been decided by this court and were therefore *res adjudicata*. We have endeavored to show

that the court erred in this, and that this court had expressly held that the "way is open" to a recovery. We believe we have pursued that way, and that, therefore, the decision of the Circuit Court of Appeals ought to be reversed, and the decree of the District Court affirmed, with interest, as under the rules this must be expressly ordered in admiralty cases.

Respectfully submitted.

CHARLES E. KREMER,
Proctor for Petitioner.

W. O. JOHNSON,
Of Counsel.

Chicago, November, 1906.

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OCT 23 1905

JAMES H. McKENNEY,

No. [redacted].134

In the Supreme Court of the United States.

NO. — OCTOBER TERM, 1905.

ERIE RAILROAD COMPANY,
Petitioner,
vs.
ERIE & WESTERN TRANSPORTATION COMPANY, CLAIMANT OF THE PROPELLER CONEMAUGH,
Defendant.

HARVEY D. GOULDER,
Cleveland, Ohio,
Proctor for Defendant.

BRIEF FOR THE ERIE & WESTERN TRANSPORTATION COMPANY.

Mere reading of the libel (Rec. 2) will show that neither the petition nor the brief in support correctly states the case made in the lower courts; and the briefest examination of the opinion of the Circuit Court of Appeals will disclose that there are no questions of general importance involved in this case made by the pleadings; further, that the only issues in this case, and all questions of law arising thereon, *in the form presented*, have been definitely and finally adjudicated upon adversely to petitioner's claim by this Court on the *same facts* and between the *same interests*.

The present case does not grow out of the collision of Oct. 21, 1891, between the propellers New York, owned by peti-

tioner's incorporate predecessor, and the Conemaugh, owned by this defendant, but is sought to be predicated on the decree entered in a cause arising out of a collision of that date, which decree was ordered by this Court,

176 U. S., 187,

and approved by this Court,

178 U. S., 317,

and finally re-affirmed by this Court,

189 U. S., 363;

and is in endeavor, through misconception by counsel of issue, fact, decision and law, to correct, or, more properly, subvert, the decision of this Court in the previous causes.

There is no conflict, no new doctrine, no modification of accepted law, no question reading beyond the particular case; no error in the particular case.

That this is plain fact, not assertion, is matter of record. As matter of convenience, we quote the statement of the court below in this case:

> "The prior proceedings in admiralty upon which the libel and decree rest the right of recovery are notable for their course and duration, and a summary is needful for understanding of the theory on which recovery was sought and allowed. As the appellant's brief well and concisely recites these facts (approved on behalf of the appellee as 'substantially correct') such recital is incorporated in this statement, as follows:
>
> 'On the 21st day of October, 1891, a collision occured in the Detroit River between the propellers New York, owned by the appellee's predecessor the Union Steamboat Company, and the Conemaugh, owned by the appellant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.
>
> 'November 11, 1891, appellant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York, denying all liability, and

attributing the disaster solely to the fault of the Conemaugh; also setting up the damage sustained by the New York as about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the physical damage to the New York, but no process was issued and the decree dismissing the cross libel was not appealed from by the Union Steamboat Company.

'On hearing both steamers were held at fault: 53 Fed., 553. Rehearing was had, resulting in the New York being held solely in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Insurance Company, and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the sole fault lay with the New York.

'On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of appellant for its own damage, and as trustee for the cargo damage, the decree providing, however, that the amount allowed for cargo insured by the intervening companies be paid to them.

'The owner of the New York appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh solely at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this appellant *in personam* for the New York's damage: 82 Fed., 819. Petition for rehearing was denied.

'This appellant and the intervening insurers petitioned the Supreme Court for writ of *certiorari*. The petition was granted, and on hearing both vessels were held at fault: 176 U. S., 187.

'Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to the appellant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay the entire cargo damage. The insurers on cargo which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67 was decreed to appellant as trustee.

'The owner of the New York then petitioned the Supreme Court for writ of mandamus, directed to the

District Court for the Eastern District of Michigan, to require said Court to enter a decree which would divide the damage to cargo equally between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S., 317.

'Although the application to the Supreme Court was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The Supreme Court said, among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was matter for appeal.

'Thereupon the owner of the New York appealed from the decree so entered. Appellant [here] moved dismissal of the appeal on the ground generally that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only in conformity with the mandate, and so was the decree of the Supreme Court. The motion to dismiss was denied: 104 Fed., 561.

'The appeal was then argued and the decree below affirmed: 108 Fed., 102.

'The Union Steamboat Company then (in its turn) petitioned the Supreme Court for a writ of *certiorari*, which was granted. The cause was again tried in the Supreme Court and the decree which had been entered by the District Court on its mandate was affirmed: 189 U. S., 363.

'While in the Supreme Court the last time the insurers who had covered that portion of the cargo for which this appellant had continued thereto as trustee, intervened.

'May 16, 1901, after dismissal of the petition for mandamus by the Supreme Court, the owner of the New York paid so much of the cargo damage as the decree required to be paid to the intervenors, and after the affirmance of the decree by the Supreme Court the remaining damage and costs were paid as provided by the decree, and the case closed.' "

The Court then continues as to the present litigation, saying:

"Objections to the libel, for want of jurisdiction and of *res adjudicata*, were raised by exceptions, and renewed

by the answer. The answer further sets up, by way of defense, the bill of lading under which the cargo of the Conemaugh was carried, which contained provisions (1) giving to the carrier the benefit of insurance on the cargo —such insurance being effected and the loss paid to the shipper—and provided against liability therefor, unless (2) written claim was made within thirty days, and (3) action was brought for any loss within three months; and it is averred that no claim was so made or action brought.

"No issues of fact arose, as a stipulation was filed which brought in the printed records in the prior proceedings as evidence, and admitted the averments of the answer respecting the terms of the bill of lading, fact of insurance and payment of loss to the shipper, and that no claim was made by shipper or insurer, or suit brought against the Conemaugh for the cargo loss, within the limitations of the bill of lading."

The libel was *in rem* against the Conemaugh, and stated as its sole basis that petitioner was not permitted in the former cause to recoup *one-half* of the damage to cargo. No other basis, no other or further ground as a basis of lien against the Conemaugh or claim against her owner was set up or presented; that is, petitioners sole contention is that under the general maritime law as administered by the admiralty in this country, *all* damage sustained in collision *must be* divided equally between the parties found at fault, *irrespective of any conditions, claim made or the state of the pleadings.*

The present petitioner brought the *same* question on the *same* facts into this Court on application for mandamus (178 U. S., 317), and later, after an adverse ruling by the Circuit Court of Appeals for the Sixth Circuit (108 Fed. 102), again brought the *same* question on the *same* facts before this Court (189 U. S., 363), and when its contention was repudiated by this Court, paid up the balance of the damages as required by the thrice affirmed decree, then instituted an original proceeding *in rem* in another district, setting up the history of the previous litigation, *without further facts or any other basis of claim.*

The district court, without consideration and conceiving that it was only required that the relief should be asked, *entered decree;* the Circuit Court of Appeals for the Seventh Circuit reversed this without announcing any doctrine at variance with this Court's announcements in the same case on the same facts.

The Circuit Court of Appeals held:

1. That defendant's general contention that a libel for contribution would not lie was not well founded.

2. "The general rule of admiralty, preserved from the ancient text of the law, is well settled in collision cases, that each vessel in fault is equally liable for injuries arising and must bear the damages equally, without reference to the degree of fault."

3. That the right to recover the

> "entire cargo damage against the New York, irrespective of the fault of the Conemaugh, is there [189 U. S., 363] settled."

4. That admiralty may enforce contribution against one not involved in a degree so as to equalize the burden, but cannot *in contravention of the express terms of a former decree enforce equalization.*

5. That in this case the apparent inequalities of burden

> *"arise out of the conduct and results of the litigation in reference to such claim of cargo damage, and not out of the collision,* and so treated are not cognizable in admiralty, apart from a primary cause to establish the respective rights and liabilities of the parties concerned."

6. And finally, and as the real basis for the whole, they say they cannot find basis for any relief

> *"under the circumstances stated in the libel."* (Op. 11.)

There is no denial of any established rule or principle, but simply the declaration that the libel does not present any cause not already adjudicated in the other case, a declaration supported by the plain wording of the label and the decision of this Court in the other case.

If petitioner's predecessor had seen fit to place itself in position to claim recoupment in the previous cause, defendant would have been in position to show that by a previous *valid* contract with the owner of the goods damaged, defendant was entitled, in the event of damage, to the *benefit* of any insurance, being the conceded fact that all of the goods damaged were insured and insurance paid to the full amount of the damage, whether

this Court would have held that by reason of the contract giving defendant the *benefit* of the insurance its payment to the owner of the goods was full *satisfaction* of the damage, and, therefore, deny the cargo any recovery; or, would have held that such payment of insurance money (*belonging to defendant under its contract with the owner of the goods*), to the owner of the goods, was *satisfaction* of the damage only as to defendant, and, therefore, limited the recovery against the New York, (on account of cargo damage) *to one-half*, is now immaterial.

Defendant in *the previous cause* was never in a position to present its defense, and under the libel in this cause was not called upon to present this defense (and others), although it did set them up in special answer to the libel. The District Court did not consider them; the Circuit Court of Appeals found no occasion to do so, as petitioner simply presented in its libel the same ground it had urged to the District Court for the Eastern District of Michigan on the coming down of the mandate, to this Court in the mandamus proceedings, to the Sixth Circuit Court of Appeals on appeal, and again to this Court when that cause was last here on *certiorari;* and on each occasion petitioner's position,—*not the law*,—have been found wanting.

Petitioner is still in the same position, *and the law is unchanged.*

We respectfully submit that five uniform, adverse adjudications on a contention presenting nothing of conflict, general import or even error, should suffice, and the petition be denied.

Respectfully submitted,

HARVEY D GOULDER.

Proctor for Defendant.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

Cleveland, Ohio, October 12, 1905.

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DEC 8 19

JAMES H. McKE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 134.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY, DEFENDANT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANT.

HARVEY D. GOULDER,
Advocate for Defendant.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

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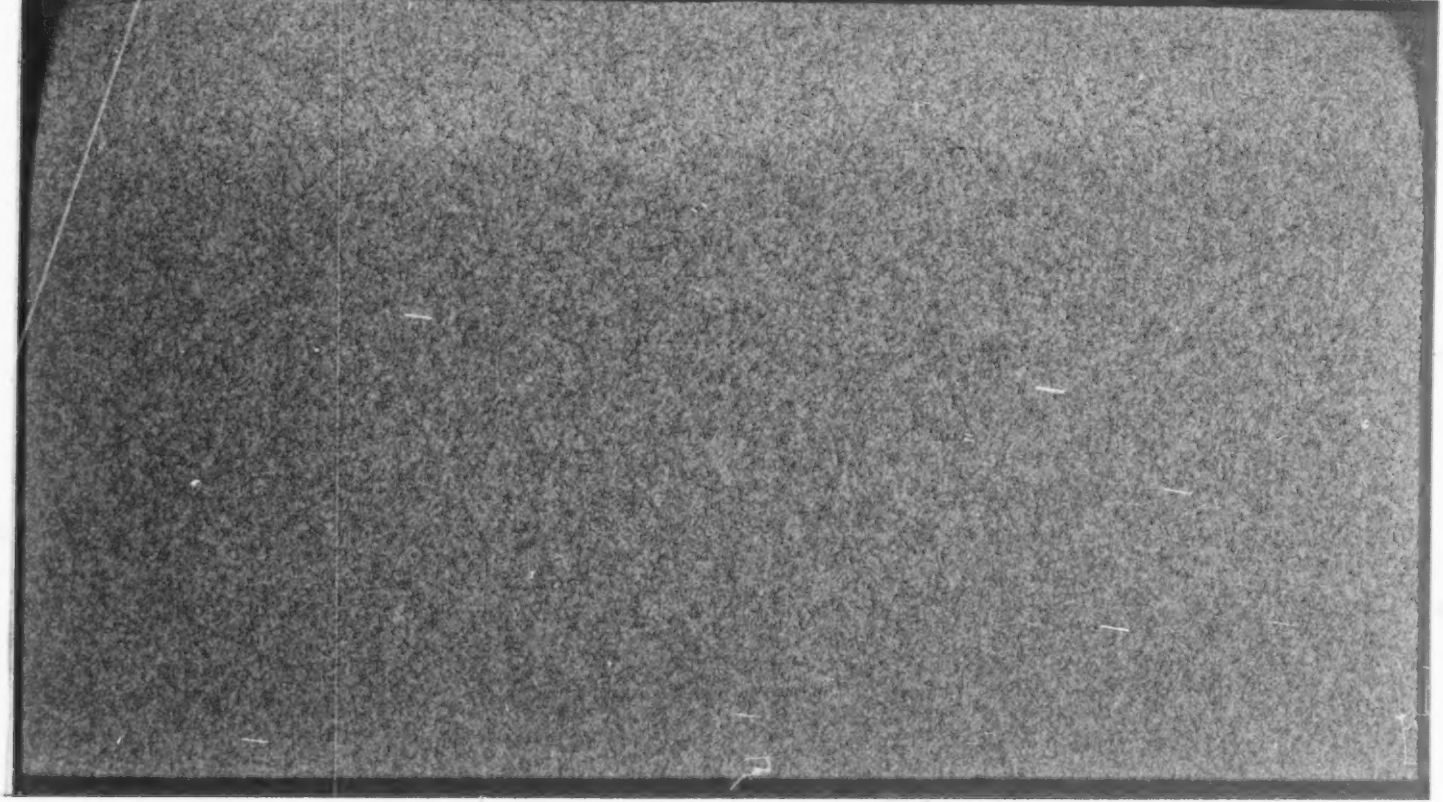

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 134.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY, DEFENDANT.

BRIEF FOR DEFENDANT.

STATEMENT.

The facts are:

On the 21st day of October, 1891, a collision occurred in the Detroit River between the propellers New York, owned by petitioner's predecessor the Union Steamboat Company, and the Conemaugh, owned by defendant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.

November 11, 1891, defendant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United

States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York; denying all liability, and attributing the disaster solely to the Conemaugh; also setting up damage sustained by the New York, about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the damage to the New York; no process was issued and the decree dismissing the cross libel was not appealed from by the Union Steamboat Company.

On hearing *both* steamers were held at fault: 53 Fed., 553. Rehearing was had, resulting in the New York being held *solely* in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Marine Insurance Company and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the New York was solely at fault.

On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of defendant here for its own damage, and, as trustee, for the cargo damage, the decree providing, however, that the amounts allowed for cargo insured by the intervening companies be paid to them direct.

The owner of the New York, petitioner here, appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh *solely* at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this defendant *in personam* for the New York's damage: 82 Fed., 819. Petition for rehearing was denied.

This defendant and the intervening insurers petitioned this court for writ of *certiorari*. The petition was granted; on hearing *both* vessels were held at fault: 176 U. S., 187.

Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to defendant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay *the entire cargo damage*. The insurers on cargo which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67, was decreed to this defendant as trustee for cargo.

The owner of the New York then petitioned this court for writ of mandamus, directed to the District Court for the Eastern District of Michigan, to require entry of decree which would divide the damage to cargo *equally* between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S., 317.

Although the application to this court in that case was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The court said, among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was a matter for appeal. 178 U. S., p. 320.

Thereupon the owner of the New York appealed from the decree so entered. This defendant moved dismissal of the appeal on the ground that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only *in conformity with the mandate*, and so was the decree of this court. The motion to dismiss was denied: 104 Federal 561.

The appeal was then argued and the decree below affirmed: 108 Fed., 102.

The Union Steamboat Company (petitioner's predecessor) then (in its turn) petitioned the Court for writ of *certiorari*, which was granted. The cause was again tried here and the decree which had been entered by the District Court on mandate of this court was affirmed: 189 U. S. 363.

While in this court the last time the insurers who had covered that portion of the cargo for which this defendant had continued thereto as trustee, intervened for their own interest.

May 16, 1901, after dismissal of the petition for mandamus, the owner of the New York paid so much of the cargo damage as the decree required to be paid direct to the intervenors, and after the affirmance of the decree by this court the remaining damage and costs were paid as provided by the decree, and that case *closed*.

This statement was accepted by the Circuit Court of Appeals as correct. (52.)

The previous litigation was in the eastern District of Michigan, the Sixth Circuit Court of Appeals and this court; the present litigation began in the Northern District of Illinois.

The libel in this present case (11), after reciting generally the history of the litigation as hereinbefore shown, complains that in the former litigation the New York was required to pay the sum of $52,552.55, whereas one-half of the total damage was only $32,817.94; that the decree requiring such payment was arrived at by compelling the owner of the New York to pay all of the cargo damage and one-half of the damage to the Conemaugh, less one-half of the New York's damage; that it was not permitted to *recoup* or *offset* one-half of the amount it had been compelled to pay to the cargo from or against the owner of the Conemaugh.

While the terms "recoupment" and "offset" are used in the libel here, as matter of fact the proceedings show that the endeavor of the New York was to require *one-half* of

the cargo damage to look to this defendant for its damage. *Recoupment* or *offset* could, of course, only operate to the amount falling to this defendant by the decree: $13,083.33 and interest. The prayer of the libel was that libelant be allowed to recover against the Conemaugh, her engines, etc., the sum of $19,734.61, and interest.

To this libel the Erie & Western Transportation Company (defendant here) filed four exceptions (16):

> I. "That the allegation of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.
>
> II. "Because it appeared from said libel that the Union Steamboat Company, under the course and practice of the admiralty courts of the United States, has already had its day in court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the court, and the same is *res adjudicata*.
>
> III. "Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit the libelant to maintain this action would be to permit the splitting of a single cause of action.
>
> IV. "Because libelant by its predecessor in ownership of the propeller New York has already had its day in a court of competent jurisdiction, has presented its claim, had it adjudicated upon and has received payment, according to the course and practice of admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~433~~. 134.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 16, 1905.
CERTIORARI AND RETURN FILED NOVEMBER 17, 1905.

(19,935.)

(19,935.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 433.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1904.

No. 1137.

ERIE & WESTERN TRANSPORTATION COMPANY,
Appellant,

vs.

ERIE RAILROAD COMPANY,
Appellee.

MR. HARVEY D. GOULDER,
Counsel for Appellant.

MR. CHARLES E. KREMER,
MR. W. O. JOHNSON,
Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois.

Pleas had at a regular term of the District Court of the United States for the Northern Division of the Northern District of Illinois begun and held at the Unites States Court Rooms in the City of Chicago in said Division of said District on the First Monday of July (it being the fourth day thereof) in the year of our Lord One Thousand Nine Hundred and Four and of the Independence of the United States the One Hundred Twenty-eighth year.

The Honorable Christian C. Kohlsaat, Judge, being absent, John C. Ames, United States Marshal being absent,

In pursuance with the order of the Court of date July 2, 1904, T. C. MacMillan, Clerk, by his Deputy Chas. A. Buell, being now here present, adjourns said Court until Wednesday, July 6, A. D. 1904, at ten o'clock A. M.

6. Be it remembered that heretofore, to wit, on the 6th day of
2 February, A. D. 1904, there was filed in the Clerk's Office of said Court, a Libel of the Erie Railroad Company vs. Propeller "Conemaugh" in Admiralty, No. 9576, said libel being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Northern Division.

In Admiralty.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

The libel of the Erie Railroad Company, New York, against the propeller "Conemaugh", her engines, boilers, boats, tackle, apparel and furniture, alleges as follows:

1st: That at the different times mentioned in the libel the libelant was a corporation duly organized under the laws of the State of New York.

2nd: That at the time of the collision hereinafter mentioned the Union Steamboat Company was a corporation organized under the laws of the State of New York, with its principal office at Upper Nyack, Rockland County, New York, and at the time of the said collision, and for a long time thereafter, was the sole owner of the Propeller "New York," hereinafter mentioned.

3rd: That on the 30th day of June, 1896, the libelant owned all of the capital stock of the Union Steamboat Company, and on the said day, under the laws of New York, known as Chapter 935 of the laws of 1896, merged the said Union Steamboat Company in and with the libellant, and that by virtue of the said merger the libellant acquired and became possessed of all the estate, property, rights, privileges and franchises of such corporation
3 in substantially the same manner as the same were held by the said Union Steamboat Company, and that by virtue of the said merger and consolidation of the said Union Steamboat Company with the libelant, the latter became entitled to collect and claim all debts and claims due to the said Union Steamboat Company from any person or party, and therefore, became and was and is entitled to the various sums of money to be recovered by it in this suit.

4th: That at the different times hereinafter mentioned the said Propellers "New York" and "Conemaugh" were steam ves-

sels of more than twenty tons burthen, enrolled and licensed for the coasting trade, and employed in commerce and navigation upon the Great Lakes.

5th: That on or about the 21st day of October, 1891, a collision occurred on the waters of the Detroit River between the said Propellers "New York" and "Conemaugh," which resulted in the sinking of the "Conemaugh."

6th: That on the 11th day of November, 1891, the Erie & Western Transportation Company, as owner of the said Propeller "Conemaugh," and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the aggregate sum of $70,000 for damages sustained by the Propeller "Conemaugh" and her cargo by reason of said collision.

7th: That thereafter the Union Steamboat Company, as the owner of the Propeller "New York," filed its answer to said libel, denying all liability for the said collision, and the damage resulting therefrom, and alleging that the said collision was due solely
4 to the fault of the Propeller "Conemaugh," and that the damages suffered by the "New York," arising out of the said collision, amounted to the sum of $3000.00.

8th: That thereupon a trial was had in the District Court of the United States for the Eastern District of Michigan, and the Court held that both the Propellers were at fault for the collision, as will more fully appear from a decision of the case entitled The "New York," 53 Federal Reporter, 553.

9th: That thereupon a rehearing was asked for on behalf of the Erie & W. Trans Company, and the District Court reversed its former decision and held the Propeller "New York" solely at fault for the collision.

10th: That thereupon the following Insurance Companies filed their petitions and intervened in the said cause, claiming damages to the cargo of the "Conemaugh," which they had insured in the following amounts:

British & Foreign Marine Insurance Company, Limited	$2421.84
Insurance Company of North America	7950.09
Union Marine Insurance Company	8553.06
Marine Insurance Company	916.57

11th: To all of the petitions of the above intervenors the Union Steamboat Company filed its answer, denying all liability for the collision, and alleging that the fault of the same rested solely upon the "Conemaugh."

12th: That on the 25th day of January, 1895, a stipulation was made between the proctors for the Union Steamboat Company and intervenors on the one side, and the proctors for the claimant and cross libelant on the other, being all of the parties interested in said cause, in which it was agreed that the damages sustained by the owner of the Propeller "New York," on account of the said collision, amounted to the sum of $3391.19.

13th: That subsequently a decree was entered in favor of libellant, the Erie & Western Transportation Company, for all of the damages sustained by the Erie & Western Transportation
5 Company as owner of the "Conemaugh," and also as the bailee of her cargo and there was also included decrees for the damage sustained by the respective Insurance Companies which had intervened in the said cause.

14th: That upon the hearing of the said cause in the Circuit Court of Appeals for the Sixth Circuit, to which the same had been removed by appeal, the latter Court reversed the decision of the District Court and found the Propeller "Conemaugh" solely at fault for the collision and decreed that the Union Steamboat Company was entitled to recover damages sustained by the Propeller "New York." For a full text of the decision in the said cause reference is hereby had to the cause of The "New York," 82 Federal Reporter, 819.

15th: A petition for a rehearing was filed in the said cause, but was denied by the said Circuit Court of Appeals for the Sixth Circuit, and for a full text of the decision reference is had to the case of The "New York," 82 Federal Reporter, 814.

16th: That thereupon the Erie & Western Transportation Company filed its petition in the Supreme Court of the United States for a writ of certiorari in the said cause, directed to the Circuit Court of Appeals for the Sixth Circuit, which writ the Court granted and the case was removed to the Supreme Court of the United States and there heard and decided, the Court finding both the Propeller "Conemaugh" and the Propeller "New York" at fault for the collision, and that the damages be divided. For the full text of this decision see the case of the "New York," 176 U. S. 187.

6 17th: That thereupon the Supreme Court of the United States, on the 22nd day of January, 1900, issued its mandate in the words and figures following, to wit:

"UNITED STATES OF AMERICA, } ss.:

To the President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Eastern District of Michigan,

Whereas lately in the United States Circuit Court of Appeals for the Sixth Circuit, in a cause between the Union Steamboat Company, claimant of the Propeller "New York," appellant, and the Erie & Western Transportation Company, libellant, and the British & Foreign Insurance Company, Limited; Insurance Company of North America, The Union Marine Insurance Company, and the Marine Insurance Company, Limited, intervening petitioners, appellees, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 5th day of October, A. D. 1897, is in the following words: "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

'On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same hereby is reversed with costs, and the cause is remanded to the Court whence it came, with directions to dismiss the libel of the owners of the "Conemaugh," and the petition of the intervening Insurance Companies, and to enter a decree in personam in favor of the owners of the New York against the owners of the Conemaugh for the agreed damages to the New York,' as by inspection of the transcript of the record of the United States Circuit Court of Appeals, which was brought into
7 the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine the said cause come on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in the cause be and the same is hereby reversed, the claimants of the Conemaugh, and the claimant of the New York each to pay one half of all costs in this cause.

And that the said Erie & Western Transportation recover

against the Union Steamboat Company, $276.75 for one half of the cost herein expended and have execution therefor.

And it is further ordered, that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this Court, with interest from July 3rd, 1896, until paid, at the same rate per annum that decrees bear in the Courts of the State of Michigan.

Dec. 7th, 1899.

You therefore, are hereby commanded that such execution and proceedings be had in the said cause in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred.

8 JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States."

18th: That afterwards, and subsequent to the decision of the Supreme Court on the 17th day of March, 1900, the proctors representing the different parties interested in said litigation, entered into a stipulation which defined the amount of damages sustained by the different parties interested in the said cause, which stipulation is in the words and figures, following, to wit:

"THE DISTRICT COURT OF THE UNITED STATES,

For the Eastern District of Michigan.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, Libelant, The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors.*	In Admiralty.
vs.	
The Propeller "New York," The Union Steamboat Company, *Complainant.*	

It is hereby stated that the losses sustained by the parties to

this cause by the collision between the said Propellers Conemaugh and New York, with interest to July 3rd, 1896, shown by the record in said cause, are as follows:

Erie & Western Transportation Company, owners of Propeller Conemaugh	$30,508.46
Erie & Western Transportation Company, Trustee for underwriters on cargo, other than intervenors	19,627.67
British & Foreign Marine Insurance Company, Ltd.	2,421.84
The Insurance Company of North America.	7,950.09
The Union Marine Insurance Company.	8,553.06
The Marine Insurance Company, Limited	916.57
9 Union Steamboat Company, owners Propeller New York	4,341.80
Total losses.	74,319.49

HARVEY D. GOULDER,
Proctor for Libellant,
F. H. & G. L. CANFIELD,
Proctors for intervenors.
C. E. KREMER & WISNER & HARVEY,
Proctors for Claimant.

Dated March 17th, 1900."

19th: That thereupon on the 24th day of March, 1900, the District Court of the United States for the Eastern District of Michigan, in pursuance to the mandate of the Supreme Court, passed and entered the following decree.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Michigan.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, Libelant, The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; The Union Marine Insurance Company, Limited, *Intervenors*, vs. The Propeller New York, the Union Steamboat Company, *Claimant.*	In Admiralty.

On reading and filing the mandate of the Supreme Court in this cause, bearing date the 22nd day of January, in the year of our Lord one thousand nine hundred, and in obedience to said mandate and in consonance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said Propeller "Conemaugh," and the said Propeller New York, were both in fault for the collision set forth in the pleadings in this cause, and that the damages to said vessels and their owners resulting therefrom be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company;

And it is further ordered, adjudged and decreed that the underwriters and owners of the cargo of said Propeller Conemaugh recover the full amount of their damages against the Union Steamboat Company and the American Surety Company, of New York, its surety upon the bond or stipulation herein filed, with interest at the rate of seven per cent. per annum (that being the rate per annum that judgments and decrees bear in the courts of Michigan under the statute of said State), from the 3rd day of July, 1896, until paid.

And it appearing that the above named intervenors were insurers of portions of said cargo, and that they have suffered damages on account of said collision, as follows, to wit:

The British & Foreign Marine Insurance Company, Limited, in the sum of $2421.84
The Union Marine Insurance Company, in the sum of .. 8553.06
The Marine Insurance Company, Limited, in the sum of 916.57
The Insurance Company of North America, in the sum of 7950.09

It is further ordered, adjudged and decreed that said intervenors severally recover from the said Union Steamboat Company and its surety their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of seven per cent. per annum from the 3rd day of July, A. D. 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into Court, or to the proctors for said inter-
11 venors, the damages and interest aforesaid, and that in default thereof the said intervenors have executions therefor.

And it further appearing that the owners of said cargo and their underwriters, other than the intervenors, have suffered damages by said collision in the sum of $19,627.67, for which the said Erie & Western Transportation Company appears in this suit as Trustee only, it is further ordered, adjudged and decreed that said Trustee recover from said Union Steamboat Company and its surety, in trust, for the said owners of and under writers on cargo, the aforesaid sum of $19,627.67 with interest thereon at the rate of seven per cent. per annum from July 3rd, 1896, until paid, and that it have execution therefor.

And it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company recover from the said Union Steamboat Company and its surety aforesaid, the sum of $13,083.33 (being one half of the damages to said Conemaugh, less one half of the damage suffered by said New York in said collision), together with interest thereon at the rate of seven per cent. per annum from July 3, 1896.

And it is also decreed that said libellant recover of said claimant and its surety, $276.75, as one half the costs of said cause in the Supreme Court, and also one half of all costs of said cause in this Court and in the United States Circuit Court of Appeals for the Sixth Circuit.

And it is further ordered that if default be made in payment of any of the said sums, executions issue therefor against the said claimant and its surety aforesaid.

HENRY D. SWAN,
District Judge."

20th: And thereupon a petition was filed by the Union Steamboat Company in the Supreme Court of the United States, praying for a writ of mandamus to issue to the Judge of the District Court of the United States to show cause why he did not obey the
12 mandate of the Supreme Court, as hereinbefore set forth.

The petition being granted the Court had a hearing upon the same, and then denied the writ prayed for, which decision will be

6. found in the case of Ex parte Union Steamboat Company, 178 United States, 317.

21st: That thereupon an appeal was prayed from the decision of the District Court, in entering the decree above referred to, to the Circuit Court of Appeals for the Sixth Circuit, and a motion therein was made by the appellees to dismiss the appeal, which was denied, as reference thereto will more fully show the "New York," 104 Federal Reporter, 561.

22nd: That thereupon the case came up for hearing in the United States Circuit Court of Appeals for the Sixth Circuit, and the Court affirmed the decision and the decree of the District Court herein last before mentioned, as will more fully appear from the decision of the Court in the case of the "New York," 108 Federal Reporter, 102.

23rd: That thereupon a petition for a writ of certiorari was filed in the Supreme Court of the United States, by the Union Steamboat Company, to be directed to the United States Circuit Court of Appeals for the Sixth Circuit, which said petition was granted, and thereupon the case came up for a hearing in the Supreme Court of the United States, and the decision of the said Circuit Court of Appeals was affirmed, as will appear from the full text of said decision found in the case of the Union Steamboat Company vs. Erie & Western Transportation Company, 189 United States, 363.

13 24th: That thereupon the mandate of the Supreme Court of the United States issued to the District Court of the United States for the Eastern District of Michigan, affirming the decree entered by the said Court on the 24th day of March, 1900, and execution issuing thereon this libellant, as the successor of the Union Steamboat Company, was compelled to pay the amount of said decree, with interest thereon at the rate of 7 per cent. per annum, as provided by the said decree.

25th: That the Court having decided and found that the said Propellers "Conemaugh" and "New York" were both at fault for the said collision, they therefore, became and were liable each for one half of all the damages arising out of the said collision, and that the total amount of the said damages, as agreed to by the said stipulation of the parties, amounted to the sum of $74,319.49, and the Union Steamboat Company and libellant became and were therefore, liable for the sum of $37,159.74, one half of the total damages arising out of the said collision, and deducting from this the damages sustained by the Propeller "New York", left the sum of $32,817.94 for it to pay, but instead thereof the said District Court, by its decree and the execution thereunder, compelled the Union Steamboat Company and libellant to pay the sum of $52,552.55.

26th: That the said decree was arrived at by compelling the

Union Steamboat Company and libellant to pay all of the damages sustained by the Intervening Insurance Companies, amounting in the aggregate to $19,841.56, and also the total damages, to the cargo, represented by the Erie & Western Transportation Company as trustee, and amounting to the sum of $19,627.67, or a total of $39,469.23, and that it did not permit the Union Steamboat Company or libellant to recoup or offset one half of the foregoing
14 sums, paid on account of the loss and damage to the cargo, against the claim of the Erie & Western Transportation Company, on account of the damages to the Propeller "Conemaugh," because they claimed that affirmative relief in that respect had not been demanded by separate pleadings, and that the Union Steamboat Company and libellant therefore must be relegated to its separate remedy against the "Connemaugh" for a recovery of a moiety of the damages paid on account of the cargo.

27th: That the Union Steamboat Company and libellant have, at different times in the proceedings, prayed the Court to decree, and the Erie & Western Transportation Company to pay the aforesaid sum, but the said Erie & Western Transportation Company has failed so to do, and the Union Steamboat Company and libellant were therefore, compelled to pay the aforesaid difference of $19,734.61, with interest thereon at the rate of 7 per cent. per annum from the 24th day of March, 1900, to the time of payment, upon which said sum libellant is entitled to the legal rate of interest to the date of its payment by the owner of the "Connemaugh."

28th: That libellant is entitled to recover from the said Propeller "Conemaugh" and her owners, the Erie & Western Transportation Company, the aforesaid sum of $19,734.61, with interest thereon to the date of payment.

29th: That all and singular the premises are true.

Wherefore libellant prays that process in due form of law may issue against the Propeller "Connemaugh," her engines, boats, boilers, machinery, tackle, apparel and furniture, and that this Honorable Court will be pleased to pronounce for libellant's demand and decree the same paid, with costs and interest, and that the said Propeller be condemned and sold to pay the same, and for such
15 other and further relief and redress in the premises as in law and justice libellant is entitled to receive.

ERIE RAILROAD CO.,
by C. E. KREMER,
Proctor

C. E. KREMER,
W. O. JOHNSON,
Proctors.

6. State of Illinois, } ss.
County of Cook. }

On this 6th day of February, A. D. 1904, before me personally appeared C. E. Kremer, Proctor, the agent of the above named libellant, and was sworn to the truth of the foregoing libel.

THEO. C. ROBINSON,
(Seal) *Notary Public.*

(Endorsed) 9576. District Court of U. S. North. District of Ills. Erie Railroad Co. vs. Prop. Conemaugh. Libel. Filed Feb. 6, 1904. T. C. MacMillan, Clerk. C. E. Kremer, W. O. Johnson, Proctors for Libellant.

And afterwards, to wit, on the 6th day of February, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Libellant's Stipulation, same being in the words and figures following, to wit:

16 LIBELANT'S STIPULATION.

United States of America,
Northern District of Illinois, } ss.
Northern Division.

United States District Court,..... Term, A.D.18....
whereas, a Libel was filed in this Court on the 6th day of February A. D. 1904, by Erie Railroad Company, against the Propeller Conemaugh her boilers, engines, machinery, boats, tackle, apparel and furniture, for the reasons and causes in said libel mentioned, and praying that the same may be condemned, and sold to answer the prayer of the libelant; and the said libelant and C. E. Kremer, Charles W. Greenfield, sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant, or its sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libelants above named shall pay all such costs as

shall be awarded against it by this Court, or, in case of appeal, by the Appellate Court.

ERIE RAILWAY CO.,
by C. E. KREMER, *Proctor.*
C. E. KREMER.
CHARLES W. GREENFIELD.

Taken and acknowledged this.....day of.....A. D. 18..... before me.

Northern District of Illinois:- } ss.

C. E. Kremer, party to the above stipulation, being duly sworn, depose and say that he reside in the Northern District of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

C. E. KREMER.

Sworn this 6 day of February, A. D. 1904 before me.

CHARLES W. GREENFIELD,
(Seal) *Notary Public.*

17 (Endorsed) 9576. District Court United States, Northern District of Illinois, Northern Division. In Admiralty. Erie Railroad Co. vs. Propeller "Conemaugh." Libelant's Stipulation. Filed February 6, 1904. T. C. MacMillan, Clerk. C. E. Kremer, W. O. Johnson, Proctor for Libelant.

18 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Claim, same being in the words and figures following, to wit:

In the District Court of the United States,

For the Northern District of Illinois.

Erie Railroad Company,
vs.
Propeller "Conemaugh," her engines, etc., } In Admiralty.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, Within and for said District:

Now comes the Erie & Western Transportation Company, a corporation of the commonwealth of Pennsylvania, owner of the said propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, intervening for its interest in the said property, appears before this Honorable Court and claims the said property and states that the said Erie & Western Transportation Company is the true and bona fide owner thereof, and that no other person or persons are the owners thereof.

And thereupon, the said claimant prays that this Honorable Court will be pleased to decree a restitution of the aforesaid property to said owner, The Erie & Western Transportation Company, and otherwise right and justice to administer in the premises.

The Erie & Western Transportation Co.
by J. C. Evans, *W. Mngr.*

19 Subscribed and sworn to before me by J. C. Evans this 19th day of February, A. D. 1904, at Buffalo, in the State of New York.

Edward H. Chase,
[Seal] *Notary Public.*

In the District Court of the United States for the Northern District of Illinois. No. 9576. Erie Railroad Company, vs. Propeller "Conemaugh," her engines, etc. Claim. Filed April 18, 1904. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Claimant.

20 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond, same being in the words and figures following to wit:

Know all Men by these Presents, That we, The Erie & Western Transportation Company, as principal, and The Bankers Surety Company, as surety, do hereby acknowledge ourselves, jointly and severally, to be held and firmly bound unto The Erie Railroad Company in the sum of Thirty Thousand Dollars, lawful money of the United States of America, to be paid unto the said Erie Railroad Company, its successors or assigns, to which payment well and truly to be made, we hereby bind ourselves our successors and assigns firmly by these presents:

Sealed with our Seals and dated this 19th day of February in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

Whereas, a Libel has been filed in the District Court of the United States within and for the Northern District of Illinois on the 6th day of February, A. D. 1904, by The Erie Railroad Company against the propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, in a certain action, etc., civil and maritime, for damages, wherein it is alleged that there is due and owing to the said Erie Railroad Company the sum of Nineteen Thousand Seven Hundred Thirty-four and 61/100 Dollars ($19734.61).

The Condition of this Obligation is such, that if the above bounden Erie & Western Transportation Company shall abide and answer the decree of the Court in such cause, then the above obligation to be void, otherwise to be and remain in full force and virtue.

THE ERIE & WESTERN TRANSPORTATION CO.
by J. C. EVANS, *W. Mngr.*

THE BANKERS SURETY COMPANY,
21 D. A. MACBETH,
2nd Vice President.
Attest: HOWARD H. BURGESS,
Secretary. [Seal]

Taken and acknowledged before me and signed by the Erie & Western Transportation Company in my presence, at Buffalo in the State of New York, this 19th day of February, A. D. 1904.

EDWARD H. CHASE,
[Seal]. *Notary Public.*

Taken and acknowledged before me and signed by the Bankers

Surety Company in my presence at Cleveland in the State of Ohio, this 15 day of April, A. D. 1904.

TRACY H. DUNCAN,
Notary Public in and for County of Cuyahoga and State of Ohio.
(Seal)

Approved C. E. KREMER,
Proctor.

I hereby approve of the above bond.

.....
United States District Judge.

(Endorsed) In the District Court of the United States for the Northern District of Illinois. No. 9576. Erie Railroad Company vs. Propeller "Conemaugh," her engines, etc. Bond. Filed April 18, 1904, T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for claimant.

22 And afterwards, to wit, on the 18th day of April, A. D. 1904, there was filed in the Clerk's Office of said Court in the above entitled cause, Exceptions of The Erie & Western Transportation Company, said Exceptions being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company, *Libelant*; vs. Propeller "Conemaugh," Her engines, etc., Erie & Western Transportation Company, *Claimant.*	Exceptions of the Erie & Western Transportation Company, *Claimant.*

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, for the Northern District of Illinois.
Claimant excepts to the libel filed herein on the following grounds:
I. That the allegations of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.

II. Because it appears from said libel that the Union Steamboat Company, under the course and practice of the admiralty courts of the United States, has already had its day in court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the Court, and the same is res adjudicata.

III. Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit the libellant to maintain this action would be to permit the splitting of a single cause of action.

IV. Because libellant by its predecessor in ownership of the propeller New York has already had its day in a court of competent jurisdiction, has presented its claim, had it adjudicated upon and has received payment, according to the course and practice of
23 admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all matters arising from or in consequence of said disaster, and if it failed to set up and claim any damage or right growing out of said collision, it is estopped from now presenting it.

THE ERIE & WESTERN TRANSPORTATION CO.,
By GOULDER, HOLDING & MASTEN,
Its Proctors.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libellant, vs. Propeller "Conemaugh" her engines, etc., Erie & Western Transportation Company, Claimant. Exceptions of the Erie & Western Transportation Company, Claimant. Filed April 18, 1904. T. C. MacMillan, Clerk. Goulder, Holding and Masten, Proctors for Claimant.

24 And afterwards, to wit, on the 13th day of June, A. D. 1904, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Co.
9576. vs.
Propeller Conemaugh

This cause coming on to be heard on the exceptions to the libel herein, come the parties by their proctors and after arguments, the Court being fully advised in the premises overrules said exceptions, to which ruling of the Court the claimant duly excepts; whereupon the claimant is ruled to answer the libel herein within one week from this day, and this cause is set down for hearing on June 23, 1904, at ten o'clock A. M.

25 And afterwards, to wit, on the 23d day of June, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Answer, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company,
Libelant,
vs.
Propeller "Conemaugh,"
her engines, etc.,
Respondent.
} Answer.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois.

The answer of the Erie & Western Transportation Company, Claimant of the Propeller Conemaugh, her engines, boilers, boats, tackle, apparel and furniture, to the libel of the Erie Railroad against said propeller.

I. Respondent says that it is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and as such is now and at all times hereinafter mentioned was sole owner of the propeller Conemaugh, her engines,

boilers, boats, tackle, apparel and furniture, and as such owner it has claimed and bonded said propeller Conemaugh in this proceeding and has been admitted to defend.

II. Respondent admits the allegations of the First, Second, Third, Fourth, Fifth and Sixth Articles of said libel.

III. Respondent admits the seventh Article of said Libel and further answering said article says that the Union Steamboat
26 Company, in addition to setting up the damages suffered by the New York in its answer in said cause, on or about the 25th day of February, 1892, filed its cross-libel against the propeller Conemaugh claiming its said damage, and that said damage was adjudicated upon, and by the final decree referred to in said libel was paid by the Erie & Western Transportation Company in accordance with the course and practice in admiralty in cases of mutual fault.

IV. Respondent admits the allegations of Articles Eighth and Ninth of said libel.

V. Touching the allegations of Article Tenth of said libel, respondent admits that the said insurance companies named therein did intervene in said cause as insurers on cargo for a part of the damage claimed by the Erie & Western Transportation Company as Trustee, but says that said intervention was prior to the entry of final decree in said cause in the District Court, to wit, prior to July 3, 1896, and that by the decree entered on said last mentioned date the amounts found due on account of cargo damage indemnified by said intervening insurance companies named was decreed to be paid directly to them.

VI. Respondent admits the allegations of the Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Articles of said libel.

VII. Touching the allegations of Article Sixteenth of said libel, respondent says that it did apply to the Supreme Court of the United States for a writ of certiorari; that said writ was granted and the cause removed to the Supreme Court of the United States, was there heard and determined, and that the decision thereof was as reported in 175 United States Report, at p. 187: that the Court therein found both the propeller Conemaugh and New York at fault, and held that the damages to the steamers be divided.

27 VIII. Claimant admits the Seventeenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-third Articles of said libel.

IX. Answering the Twenty-fourth article of said libel, respondent admits that the Supreme Court of the United States affirmed the decree of March 24, 1900, of the District Court of the United States for the Eastern District of Michigan, and issued its mandate of

affirmance, but respondent denies that libelant, as successor to the Union Steamboat Company, was by execution compelled to pay the amount of said decree and interest thereon at seven per cent. (7) per annum, or any sum, and further answering said article says that the mandate referred to in said article was dated January 22, 1900; that on or about the 16th day of May, 1901, either the Union Steamboat Company or libelant paid to the four insurance companies mentioned in the Tenth, Eighteenth, and Nineteenth Articles of said libel the sums therein named and interest at seven per cent. (7%) per annum from July 3, 1896, until paid, but claimant is uninformed as to the exact date of the payment or the amount thereof. Respondent says that said insurance companies were insurers on cargo of the steamer "Conemaugh." which had been damaged in said collision, and as such had paid the loss sustained by the owners of said cargo by reason and in consequence of said collision.

And further answering said article, respondent says that while said cause was pending in the Supreme Court of the United States under writ of certiorari issued on petition of the Union Steamboat Company as in the Twenty-third Article alleged, the following named insurance campanies, also insurers on and paying damage to said cargo, to wit, The Manheim Insurance Company of Manheim, Germany; The Fireman's Fund Insurance Company of San Francisco; The London Assurance Corporation and The
28 British & Foreign Marine Insurance Company, on September 8, 1902, did intervene by leave of Court for the entire amount of damage to cargo ordered by the decree of July 3, 1896, to be paid to the Erie & Western Transportation Company, as Trustee, to wit, Nineteen Thousand, Six Hundred Twenty-seven and 61/100 Dollars ($19,627.61) and the interest thereon at the rate of seven per cent. (7%) per annum from July 3, 1896, until paid, predicating their intervention upon the claim therein assented to by all the parties that the said interventors were insurers upon cargo of the propeller Conemaugh and on account of which said sum was decreed to respondent as trustee, and as such insurers they paid to the owners of said cargo the amount of their loss by reason of said collision and subsequent sinking of the Propeller Conemaugh. That on or about the 25th day of May, 1903, either the Union Steamboat Company or libellant paid said sum of Nineteen Thousand, Six Hundred, Twenty-seven and 61/100 Dollars ($19,627.61), with the interest thereon at seven per cent. (7%) per annum from July 3, 1896, to said date of payment, in all the sum of Twenty-nine Thousand, One Hundred and 20/100 Dollars ($29,100.20), and that the whole of said sums was paid to the insurance companies which intervened as hereinbefore stated by reason of their having

as insurers paid the owners of the cargo of said propellor Conemaugh the loss to cargo on account of which recovery was made.

X. Touching the allegations of the Twenty-fifth and Twenty-sixth Articles of said libel, claimant denies the same and avers that the decree of March 24, 1900, of the District Court for the Eastern District of Michigan, was in accord with the mandate of the Supreme Court of the United States and was so held to be by the United States Circuit Court of Appeals for the Sixth Circuit in the cause referred to in the Twenty-second Article of
29 said libel, and by the Supreme Court of the United States on two separate hearings, as referred to in the Twentieth and Twenty-third Articles of said libel.

Further answering said articles of said libel, this respondent admits that there was paid by libellant or the Union Steamboat Company on account of loss of and damage to cargo of the Propeller Conemaugh the sums hereinbefore stated; that libelant was not permitted to recoup or offset one-half or any part of the amount so paid from or against the amount decreed to be paid to this claimant in the proceedings referred to in said libel, but respondent avers that the Union Steam-boat Company did demand relief on account of damage suffered by it in said collision; that such relief was granted and that libellant and the Union Steamboat Company has, in accordance with the course and practice of the admiralty in cases of mutual fault, had relief in said proceedings on account of its damage, and that if it failed to claim all the relief to which it might be entitled, it has waived its right to now make such claim, and to permit libelant to make a further claim by reason of any matter or thing growing out of said collision would be to permit the splitting of a single cause of action.

XI. Answering the Twenty-seventh Article of said libel, claimant admits that the Union Steamboat Company during the course of said proceedings in said libel mentioned, sought to have decreed against this claimant one-half the damage sustained by cargo, and to recoup against damage due respondent, but that the said District Court of the United States declined so to do, but did decree that the whole of said cargo damage should be paid by libellant in accordance with the mandate of the Supreme Court of the United States, and that the action of the said District
30 Court of the United States for the Eastern District of Michigan in that regard was affirmed by the Supreme Court of the United States and by the United States Circuit Court of Appeals for the Sixth Circuit, and again reaffirmed by the Supreme Court, as hereinbefore and in said libel shown, and respondent says that libelant's claim of right to recoup or recover one half or any part

of said sum so paid on account of damage to cargo from this respondent was denied in said proceedings by the Supreme Court of the United States, and this Court is without jurisdiction to review the action of said court.

XII. Respondent denies that libellant is entitled to recover from the propeller Conemaugh the sum of Nineteen Thousand, Seven Hundred, Thirty-four and 61/100 Dollars ($19,734.61), with interest thereon, or any other sum, and denies that any sum whatever is due to libellant, or that libelant has any cause of action whatsoever against the propeller Conemaugh.

XIII. Answering the Twenty-ninth Article of said libel, defendant denies that all and singular the premises are true, and says that the averments of said libel do not show facts which would create a lien against said propeller Conemaugh, and says the claim set up in said libel is not within the admiralty and maritime jurisdiction of this Honorable Court. And respondent further answering says the damage referred to in said libel has been adjudicated by a court of competent jurisdiction as in said libel shown, with full right, opportunity and obligation upon the Union Steamboat Company and libellant to present any and all claims or rights it had in reference thereto that libelant has had its day in court by its predecessor, the Union Steamboat Company, as to all claims
31 growing out of the disaster therein referred to; that the Union Steamboat Company presented and had adjudicated its claim against the propeller Conemaugh and this claimant, and in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault has received satisfaction of its claim so presented; that if libellant or the Union Steamboat Company for any reason neglected to or elected not to set up any claim or right or damage growing out of said disaster which it had or ought to have in the proceedings in said libel referred to, it has waived the same and is now estopped from asserting it.

XIV. And further answering said libel, respondent says that all and every part of the cargo of said propeller Conemaugh on account of which damage were allowed in the proceedings referred to in said libel and on account of which libellant or the Union Steamboat Company has made payment, was being transported under bills of lading containing the following agreement:

"Whenever any liability for loss of, or damage to, all or any of said property shall arise, that person or party, or vessel then engaged in the actual carriage or having custody of the property shall be deemed the carrier, and be solely liable for such loss or damage, (and the person or party liable who might sustain loss in

consequence of owning or chartering, or being interested in or as to such vessel, shall have any insurance, however affected, on, as to or covering the property lost or damaged and all benefit and advantage to be derived therefrom.

And respondent says that insurance against the perils which operated to the damage of said cargo of the Conemaugh and on account of which damages were awarded was affected, and paid to the full amount of said damage by the insurance companies which intervened in said cause and neither the owners of said cargo or libelant or any one claiming through or under them has any claim against the propeller Conemaugh, on which said cargo so damaged was being transported at the time, for damage to said cargo,
32 said damage as to it having been compensated in full by insurance. And further answering, respondent says that said contract of carriage under which said cargo on account of which damage has been paid by libelant or its predecessor, the Union Steamboat Company, was being transported, contained the following agreement:

"The said company shall not, nor shall any carrier, person or party, vessel or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs." And respondent says that no such written claim or other claim has been made upon this claimant by any of the owners of said cargo, or any one on their behalf, within the thirty days after the occurrence of said disaster, or at any time, and that no action was brought against it or its said steamer for said damage within three months after said damage occurred.

XV. And your respondent further avers that Section 15 of Chapter 83 of the laws of the State of Illinois provides:

"Action on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

That more than twelve years have elapsed since the happening of the damage set up in said libel, and the same is barred by said statute.

XVI. That all and singular the premises are true.

Wherefore your respondent prays that this Honorable Court will be pleased to decree the dismissal of said libel, with costs to this

respondent, and such other and further relief as it may be entitled to receive in the premises.

33 THE ERIE & WESTERN TRANSPORTATION COMPANY,
by GOULDER, HOLDING & MASTEN,
its proctors, Respondent.

GOULDER, HOLDING & MASTEN,
Proctors for respondent.

Western District and State of New York, } ss.
County of Erie. }

E. T. Evans, being duly sworn, says that The Erie & Western Transportation Company is a corporation; that he is its Vice-President and duly authorized herein; that he has read the foregoing answer, and that the allegations and averments therein contained are true, as he verily believes.

E. T. EVANS.

Subscribed in my presence and sworn to before me by the said E. T. Evans, this 18th day of June, A. D. 1904.

EDWARD H. CHASE,
Notary Public.

[SEAL.]

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Respondent. Answer. Filed June 23, 1904 at 9 o'clock A. M. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Respondent.

34 And afterwards, to wit, on the 23rd day of June, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Stipulation, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
In Admiralty.

Erie Railroad Company,
Libelant,
vs.
Propeller Conemaugh, her engines, etc.,
Erie & Western Transportation Company,
Claimant.
} Stipulation.

It is hereby stipulated between the libelant and claimant as follows:

I. That libelant or claimant may use any part of the printed record or records or proceedings in the causes referred to in the libel in this cause without other verification than comparison, but subject to objection by other party on the ground of materiality, competency or relevancy.

II. That the goods composing the cargo of the propeller Conemaugh on account of loss and damage to which libelant or the Union Steamboat Company made payment as shown, were at the time of such loss or damage being transported on steamer Conemaugh under bills of lading containing terms of carriage, etc., as in Exhibit "A" herein attached, the blanks therein being filed to cover the various consignments.

III. That on the goods as aforesaid, insurance was effected by the owners thereof with the several companies named in the answer herein, insuring the same against the loss and damage referred to in said libel, and the said insurance companies, under the insurance so effected, became liable for and paid to the owners of said cargo the amount of the loss and damage so sustained.

IV. That none of the owners of the cargo which was lost or damaged in said collision, or the insurers thereon, made claim in writing or otherwise to or upon the propeller Conemaugh or the said Erie & Western Transportation Company, its owner, within thirty days after the occurrence of said damage or at all, or bring any action against the Propeller Conemaugh or her owner, the Erie & Western Transportation Company, for any loss or damage so sustained within three months after said loss or damage occurred or at all.

Subscribed this .....day of June A. D. 1904.

ERIE RAILROAD COMPANY,
By C. E. KREMER, *its Proctor.*
ERIE & WESTERN TRANSPORTATION COMPANY
by HARVEY D. GOULDER,
its Proctor.

36 B. L. Eng. Con't.

The Erie & Western Transportation Co.
Anchor Line, on Great Lakes.
Lake Connection of the Pennsylvania Railroad Company.
Via Erie or Buffalo, at Carrier's Option.

Shipped by..... the following described property in apparent good order, but weight, quality, value, contents and condition of contents unknown. To be carried or forwarded subject to all of the conditions hereinafter contained, to the Port of.....(with Liberty to the carrying ship to call at all intermediate ports), and thence by..... to the Port of.....(or so near thereto as ship may safely get, with the previlege of calling at any usual port of call), and to be delivered in like good order, subject to said conditions, unto.....
or to.....assigns (Notify.....)
upon payment immediately on discharge of the property, of the freight thereon, at the rate of.....Cents, American Gold, per one hundred pounds gross weight and advanced charges..... ($.....)
with all other charges and average as hereinafter provided, without any allowance of credit or discount; one pound sterling to be considered equal to $4.80 American Gold.

Form No. 12, Foreign—Steam.

	Principal Agencies.	Chicago,
	J. C. Evans, Agent,	Milwaukee,
	D. M. Brigham, Agent,	St. Paul,
	S. B. Gault, North-western Agent,	Minneapolis,
	C. A. Clawson, Agent,	Winona,
37	H. C. Shepard,	Winona,
	O. J. Geer, General Agent,	New York.
	T. C. Pollock, Agent,	
	L. N. Walton,	Philada.
	R. B. Glanville,	Baltimore.

Marks and Numbers.	Articles and Weight.
E Y L P P O M C A S	Said to Weigh.....

1st: In accepting this bill of lading, the Shipper, Owner and Consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee, or Holder.

2d. The responsibility of each Carrier shall be limited to its own line.

3rd. The said Erie & Western Transportation Company, shall not, nor shall any carrier, or any person or party in possession of all or any of said property, or any vessel which received all or any of the said property or her master, be liable for any loss or damage sustained by any person or party, or for any loss of or damage to, all or any of the said property, arising from, caused by or connected with any one or more of the following mentioned causes or things, to wit: Any act of God, or a public enemy; any act or government or municipality, or any official act, any rebellion, insurrection, mob, riot, strike or combination, any peril, danger or accident of or incident to navigation or transportation, receipt or delivery, storage, or wharfage; any fire, collision, explosion of any kind, bursting or collapse of any boiler, pipe, chest, or flue, any latent defect, or any unseaworthiness or unfitness of or in any
38 vessel or other means of transportation not known to the person or party sought to be made liable; breakage or derangement of any machinery, decay, leakage, wastage, shortage of grain, breakage, wet, steam, combustion, heating, rust, dirt, frost or freezing, rubbing or chafing, contact with or nearness to other property, detention, delay, seizure, under legal process, loss or decrease of weight or quantity, change of weather, transshipment, loading or unloading, lighterage improper packing, bailing, or cooperage; any change in market value, any act or thing herein permitted; nor shall there be any liability on the part of said Company, or any carrier, person or party, vessel or her master aforesaid, or on the part of any other vessel owned, chartered, or used by said Company, or her owner or master, for any loss or damage herein mentioned, unless the same shall affirmatively, and without presumption, be proven to have been caused by the negligence of the person, party or vessel sought to be made liable, nor even if caused by any such negligence, for any loss of or damage to any statue, picture, goldware, silverware, plated ware, coin, bullion, jewel or watch, unless special contract for the transportation thereof other than this be made by special written authority from this Company, nor shall there be any liability for or on account of any wrong or mistaken carriage or delivery of, or failure to deliver, any property marked, consigned or addressed improperly or indefinitely,

June or in initials, characters or numbers; nor in case of alteration or erasure in this instrument shall there be any liability aforesaid, which would not have existed had such alteration or erasure not been made. Non-compliance with any ordinance or bylaw shall not be deemed negligence or evidence of negligence. Whenever any liability for loss of, or damage to, all or any of said property shall arise that person or party, or vessel then engaged in actual carriage or having custody of the property shall be deemed the carrier, and be solely liable for such loss or damage; and the person or party liable, or who might sustain loss in consequence of owning, chartering or being interested in or as to such vessel, shall have
39 any insurance, however effected, on, as to or covering the property lost or damaged and all benefit and advantage to be derived therefrom and at the option of such person or party, all amounts of such loss or damage shall be computed on the basis of the value of the property at the place above provided for its delivery, or at its cost at the time and place of its above mentioned receipt. The said Company shall not, nor shall any carrier, person or party, vessel or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party, sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months, after the said loss or damage occurs. Any vessel having all or any of said property on board, may tow or be towed, and may save or aid, or attempt to save or aid, life, person or property, and may delay or deviate for, or with a view to any such purpose, or for, or with a view to, any purpose connected with her navigation or business. General average payable according to Lake custom. All weights shall, at the option of any carrier, be determined by said carrier's scales; and all weights furnished to any carrier shall be subject to correction. If any nitroglycerine, gunpowder, friction matches, fireworks, or other explosive, or if any property, the carriage of which is prohibited by law, shall be received without knowledge as to its nature, and written assent to its carriage, by the receiver or carrier thereof, the same may, without notice of any kind, be destroyed, without liability therefor, or, at the option of the carrier, may be removed and stored, at the sole risk and expense of the owner.

4th: As to The Erie and Western Transportation Company, this contracy is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the port of.....

.....The said The Erie & Western Trans- Stip
40 portation Company shall not, nor shall any of its connections, fa
inland or ocean, be liable for delay, nor in any other respect than as warehousemen, while the said property remains on wharf waiting for further conveyance.

It is also stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer of the line above stated leaving, after the arrival of such articles at said Port the said The Erie & Western Transportation Company, the Steamship Company, Steamer or owner is at liberty to forward them by succeeding steamers of said line, or, if deemed necessary, in the steamers of any other line.

5th: In respect to the service after delivery by The Erie & Western Transportation Company, at the port as aforesaid it is mutually agreed as to the Steamship Company, Steamer, Owner, and all other parties undertaking, any part of said service as follows: The ship shall have liberty to sail without pilots; to tow and assist other vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship. General average payable according to York Antwerp Rules of 1890.

It is also mutually agreed that the Steamship Company, Steamer or owner shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause and wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers, or people, riots, strikes or stoppage
41 of labor by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master mariners or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrifaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or of the insufficiency of packages nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipments; nor for any loss or damage caused by the prolongation of the voyage.

June I. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, perfumeries, works of art, silks, furs, china porcelain, watches or clocks, in any respect, or for goods of any description whatever above the value of $20.00 per cubic foot, and in no case is the carrier to be liable beyond $500.00 per package unless bills of lading are signed therefor with the value therein expressed and a special agreement is made.

II. Also that shippers shall be liable for any loss or damage to ship or cargo caused by inflamable, explosive or dangerous goods, shipped without full disclosure of their nature whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

IV. Also, that in case the ship shall be prevented from
42 reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

V. Also, that the ship may commence discharge immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival, and upon discharge the goods shall be at the risk of the consignee. And if not taken by him within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and risk of their owners, and the responsibility of the steamship or steamship line for merchandise to be carried at a through rate to a point beyond the port of discharge shall terminate on the delivery of the goods or property to the next carrier.

VI. Also that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also, that if on sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the Custom House, less all charges saved, except a lower value of the articles has

been agreed upon with the shippers, and such value noted s
hereon.

43 IX. Also, freight payable on weight, is to be paid on gross weight discharged or landed from ocean steamship, unless otherwise agreed.

X. Also, goods destined for a Continental port, in the event of the Continental steamer being prevented by ice from reaching destined port, the Master reserves the liberty of either landing cargo at nearest open port he can reach with safety, or bringing it back to port of transshipment, in either case at consignees' risk and expense, but charging outward freight only; or, should the last steamer of the season have sailed for the above destined port, the goods may be sent to the port nearest to their destination with which there is direct communication, or may be warehoused at the intermediate port at the expense and risk of the owners of the goods.

XI. Parcels for different consignees collected or made up in single packages addressed to one consignee to pay full freight on each parcel.

XII. Also, that the property covered by this Bill of Lading is subject to all the conditions expressed in the customary forms of Bills of Lading in use by the ocean steamer of Ocean Steamship Company at the time of shipment.

Attention of shippers is called to the act of Congress of 1851. "Any person or persons shipping Oil of Vitriol, Unslaked Lime, Inflamable Matches, or Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States One Thousand Dollars."

In Witness Whereof, The Agent signing on behalf of the said The Erie & Western Transportation Company, and of the said Ocean Steamship Company, or Ocean Steamer and her Owner, severally

44 and not jointly, hath affirmed to.....Bills of Lading, all of this tenor and date, one of which Bills being accomplished and given up to the carrier, the others to stand void.

Dated in.....this.....day of.....189....

.....Agent.

(Endorsed) 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company vs. Propeller Conemaugh, etc. Filed June 23, 1904. T. C. MacMillan, Clerk. Stipulation. Goulder, Holding & Masten, Proctors for Respondent.

23. 45 And afterwards, to wit, on the 23d day of June, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Company
9576. vs.
Propeller Conemaugh

This cause coming on for trial, come the parties by their proctors and the Court having heard the libel and answer and stipulation of facts and arguments of counsel and not being sufficiently advised in the premises takes the cause under advisement.

11. 46 And afterwards, to wit, on the 11th day of August, A. D. 1904, the following order was had and entered of record in said cause. before the Hon. Christian C. Kohlsaat, Judge, to wit:

Erie Railroad Company
9576. vs.
Steamer "Conemaugh."

At a stated term of the District Court, of the United States of America for the Northern District of Illinois, held at the Court Room in the Federal Building in the City of Chicago, on the 11th day of August, A. D. 1904, present the Honorable Christian C. Kohlsaat, District Judge. This cause having been heard on the pleadings and proofs and argued and submitted by the advocates of the respective parties, and due deliberation having been had in the premises, it is now Ordered, Adjudged and Decreed by the Court that the libelant above named recover herein against the Steamer "Conemaugh" the damages sustained by the libellant by reason of the matters set forth in the libel herein together with costs.

47 And afterwards, to wit, on the 24th day of August, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entiled cause, a Stipulation as to damages, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES, s

For the Northern District of Illinois.

Erie Railroad Company,
vs.
Steamer Conemaugh. } Statement of Damages.

Amount decreed insurers on cargo intervening in District Court, with interest at 7% to May 16, 1901, date of payment,	$26566.19	
One-half of this,		$13283.09
Amount decreed for insurers on cargo intervening in Supreme Court, with interest at 7% to June 9, 1903, when same was paid,	$29100.29	
One-half of this,		$14550.10
		$27833.19

August 22, 1904.

C. E. KREMER,
Proctor for Erie Railroad Company.
GOULDER, HOLDING & MASTEN,
Proctors for Erie & Western Transportation Company.

(Endorsed) 9576. District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad, Libelant vs. The Conemaugh, etc.

48 Stipulation as to damages. Filed Aug. 24, 1904. T. C. MacMillan, Clerk.

49 And afterwards, to wit, on the 24th day of August, A. D. 1904, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, to wit;

Erie Railroad Company,
9576. vs.
Steamer Conemaugh.

An interlocutory decree having heretofore been made and entered herein whereby it was adjudged that the libelant recover the damages sustained by reason of the matters and things in its libel set forth against the Steamer Conemaugh, her engines, etc., and the amount of the said damages, including the interest, having been fixed by stipulation on file, at the sum of $27833.19, it is

Ordered, Adjndged and Decreed that the libellant, the Erie Railroad Company, recover herein against the steamer Conemaugh, her engines, etc., the sum of $27833.19 and interest at 5% from Dec. 10, 1903, amounting to $28815.00, and that the Erie & Western Transportation Company, claimant of the said Steamer Conemaugh, and Bankers Surety Company pay into Court or to the proctors for the libellant, the damages and interest aforesaid, and that in default thereof the libellant may have execution therefor.

And it is also decreed that the libelant recover from the said Erie & Western Transportation Company and its surety, its costs taxed in this cause and amounting to the sum of $43.10 and that in default thereof, execution may issue therefor, to the entry of which decree said Erie & Western Transportation Company by its proctors duly excepts and enters its motion for an appeal.

50 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for appeal, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

Erie Railroad Company,
Libelant;
vs.
Propeller "Conemaugh," her engines, etc.,
Erie & Western Transportation Company,
Claimant and Respondent.
} No.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois.

And now by its proctors, Messrs. Goulder, Holding & Masten, comes the Erie & Western Transportation Company, respondent in the above entitled cause, and, having filed with the clerk of said District Court an assignment of error, prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final decree of the District Court in the above entitled cause, entered on the 24th day of August, 1904.

Dated this 24th day of October, 1904.

GOULDER, HOLDING & MASTEN,
Proctors for Respondents.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, Claimant & 51 Respondent. Petition for Appeal. Filed Oct. 25, 1904. T. C. MacMillan, Clerk. Goulder, Holding & Masten, Proctors for Respondent.

52 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In Admiralty.

No.

Erie Railroad Company,
Libelant;
vs.
Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company,
Claimant and Respondent.

And now comes respondent, the Erie & Western Transportation Company, by Goulder, Holding & Masten, its proctors, and says that in the record and proceedings in this cause, and in the final decree entered therein, there is error in the following, among other things, to wit:

I. That the Court erred in overruling respondent's first exception, viz: That the allegations of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.

II. That the court erred in overruling respondent's second exception, viz: Because it appears from said libel that the Union Steamboat Compnay, under the course and practice of the admiralty courts of the United States, has already had its day in Court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the court, and the same is
53 res adjudicata.

III. That the Court erred in overruling respondent's third exception, viz: Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit libelant to maintain this action would be to permit the splitting of a single cause of action.

IV. That the Court erred in overruling respondent's fourth exception, viz: Because libellant by its predecessor in ownership of the propeller New York has already had its day in a Court of

competent jurisdiction, has presented its claim had it adjudicated upon and has received payment, according to the course and practice of admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all matters arising from or in consequence of said disaster, and if it failed to set up and claim any damage or right growing out of said collision, it is estopped from now presenting it.

V. The court erred in holding that the claim presented by the libel is within the admiralty and maritime jurisdiction of the court.

VI. The court erred in entering decree in excess of the amount claimed in the libel.

VII. The Court erred in decreeing that libellant was entitled to recover the sum of Twenty-eight Thousand Eight Hundred and Fifteen Dollars ($28,815), or any sum.

54 VIII. The Court erred in not dismissing the libel.

GOULDER, HOLDING & MASTEN,
Proctors for Respondent
THE ERIE & WESTERN TRANSPORTATION COMPANY.

(Endorsed) No. 9576. In the District Court of the United States for the Northern District of Illinois. In Admiralty. Erie Railroad Company, Libelant; vs. Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company, Claimant and Respondent. Assignment of Errors. Filed Oct. 25. 1904. T. C. MacMillan, Clerk. Goulder, Holding & Mastedn, Proctors for Respondent, the Erie & Western Transportation Company.

55 And afterwards, to wit, on the 25th day of October, A. D. 1904, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Appeal, same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

In Admiralty.

No.

Erie Railroad Company,
Libelant;
vs.
Propeller "Conemaugh," her engines, etc., Erie & Western Transportation Company,
Claimant and Respondent.
} Bond

Know All Men by These Presents that we, the Erie & Western Transportation Company, as principal, and The Bankers Surety Company, of Cleveland, Ohio, as surety, are held and firmly bound unto the Erie Railroad Company in the full and just sum of Four Thousand ($4,000) Dollars, to be paid to the said Erie Railroad Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed and dated this 24th day of October, 1904.

Whereas the above named Erie & Western Transportation Company has appealed to the United States Circuit Court of Appeals for the Seventh Circuit from a decree in favor of the above named libelant made and entered on the 24th day of August, 1904, in the above entitled action, by the District Court of the United States for the Northern District of Illinois, praying that said decree may be reversed.

Now, Therefore, the condition of this obligation is such that if the above named appellant shall prosecute its appeal to effect, and shall answer all damages and costs if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

In Witness Whereof the parties have hereunto caused their cor-

porate names to be subscribed and their corporate seals to be affixed, the day and year above written. Bond filed 190

(Seal) THE ERIE & WESTERN TRANSPORTATION COMPANY,

By FRANK J. FIRTH,
President.

Attest: FRANK STALEY,
Secretary.

56 THE BANKERS' SURETY COMPANY,
W. P. JOHNSON,
Vice President.

Attest: HOWARD H. BURGES,
(Seal) *Secretary.*

The above bond on appeal approved.
Oct. 25, 1904,

KOHLSAAT,
Judge.

(Endorsed) 9576. District Court U. S. Northern Dist. of Illinois. Erie Railroad Co. vs. Pro. "Conemaugh" et al. Bond on Appeal. Filed Oct. 25, 1904. T. C. MacMillan, Clerk.

57 And afterwards, to wit, on the 25th day of October, A. D. 1904, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit: Order 190 app

Erie Railroad Company,
Libellant,
9576. vs.
Propeller "Conemaugh," her engines, etc.,
Erie & Western Transportation Company,
Claimant and Respondent.

On petition of the Erie & Western Transportation Company, the above named Respondent, praying for the allowance of Appeal in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Circuit, it appearing to the Court that the said respondent has filed its assignment of errors as required by the rules of the United States Circuit Court of Appeals for the Seventh Circuit, which are accepted, it is—

Ordered that the said appeal be, and the same is allowed; and it is further—

Ordered that the bond on appeal be and the same is hereby fixed in the sum of Four Thousand Dollars ($4,000.00).

58 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, Do Hereby Certify the above and foregoing to be a true and correct transcript of the record in Case No. 8576, In Admiralty, in which The Erie Railroad Company is Libellant, and the Propeller "Conemaugh" is Respondent, as the same appears from the records and files in said case now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago, in said District, this 19th day of November, A. D. 1904.

T. C. MACMILLAN,
Clerk.

(Seal)

Cost of transcript $20.00.

T .C. MACMILLAN,
Clerk.

59 United States of America } ss.

The President of the United States to the Erie Railroad Company and C. E. Kremer, its Proctor, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit to be holden in Chicago, within thirty days from the date hereof pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, Northern Division, wherein the Erie & Western Transportation Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, Judge of the said District Court of the United States this 25th day of October, in the year of our Lord one thousand nine hundred and four.

KOHLSAAT,
Judge.

Service of above notice and citation accepted this 25th day of October, 1904.

.....
Proctor for Erie Railroad Company.

I have served this writ within my District upon the within named Erie Railroad Company by reading the same to and in the presence and hearing of S. P. Shane, Freight Traffic manager, at the same time delivering to him personally a true copy thereof on the 31st day of October, A. D. 1904.

I was unable to find any other officer of the said Company within my district.

JOHN C. AMES,
U. S. Marshall.
by WM. E. CASS,
Deputy.

1 Service 2.00
1 Mile .06

$2.06

IN THE DISTRICT COURT OF THE UNITED STATES;

For the Northern District of Illinois:

Erie R. R. Co.
v.
Propeller Conemaugh. } In Admiralty. No. 9576.

KOHLSAAT, *J.*

On November 11, 1891, the owners of the defendant brought suit to recover damages sustained by defendant in collision with the Propeller New York owned then by the Union Steamboat Co. to which ownership libellant herein has succeeded, and also to recover as trustee for the owners or underwriters of the cargo.

The New York, being for the purposes hereof, the libellant herein, filed a cross libel for damages sustained by her. The District Court held the New York to be alone in fault. On appeal the Circuit Court of Appeals for the Sixth Circuit reversed the finding and held the respondent herein to be alone in fault. On certiorari the Supreme Court held both vessels in fault and decided that the New York must pay the full damages of the cargo owners or their intervening representatives. On receiving the mandate, the District Court entered a decree in favor of the Conemaugh to the effect that the intervenors and the Conemaugh as trustee for cargo owners recover the full amount of the damages against the New York and at the same time refused to permit the New York to recoup or off set any damages except such as was sustained by the propeller, New York. On appeal from this decree the Court of Appeals affirmed the same and in its opinion stated that the right of set off, counter-claim or recoupment, being in no way set up in the pleadings the appellant, not being obliged to assert such claim for contribution by way of recoupment in that cause, were left "free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings is therefore denied." The cause was again taken to the Supreme Court by certiorari and affirmed, the court stating in its opinion that "The New York having been in

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fault, was responsible to the cargo and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it."

This proceeding is instituted in accordance with the suggestion of the said Circuit Court of Appeals and the Supreme Court, for contribution. The main contention here is as to whether the rights of libellant are based upon the doctrine of subrogation or that of contribution. The Conemaugh had a good defense as against claims of the cargo owners and other intervenors and seeks to interpose that fact as a defense to any attempt on the part of libellant herein to recover from her any part of the cargo damages.

If the libellant was complelled to pay damages for cargo losses, by reason of negligence to which the Conemaugh contributed, as was held by the Supreme Court, then it is of no consequence whether the Conemaugh was liable to her cargo owners or not, and she must be held to be liable for one half of the damages caused by her negligence jointly with that of the libellant. She had no such contractual relations with libellant. If the right of recovery rests wholly upon the doctrine of subrogation, then libellants claim would be disallowed. It cannot be that the court of appeals and the Supreme Court meant to decide that libellant herein should be denied the right to save its rights under the Statute of Limitations by amendment and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute. If, however, the right of recovery is based upon the doctrine of contribution, then libellant's demands are not out-lawed. This seems to me to be the reasonable construction to be placed upon the decisions of the upper court.

Libellant may present a draft of a decree in accordance herewith.

IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the opinion of the Court in cause numbered 9576 entitled Erie R. R. Co. vs. Propeller Conemaugh as same appears from the original filed in said Court on the 24th day of August A. D. 1904, and now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this ninth day of December A. D. 1904.

T. C. MACMILLAN,
Clerk.

(Seal)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit,

October Term, A. D. 1904.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company,
Appellee.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above cause that the foregoing is a true copy of the opinion of the Judge of the District Court in the above cause, and that the same, together with this stipulation, may be filed in said cause and printed by the Clerk and attached to the printed transcript of record now on file.

HARVEY D. GOULDER,
Proctor for Appellant.
C. E. KREMER,
W. O. JOHNSON,
Proctors for Appellee.

IN THE CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company,
Appellee.
} No. 1137.

Upon stipulation of the parties, it is hereby ordered that leave be and hereby is given to file in said cause instanter an authenticated copy of the opinion of the Judge of the District Court in said cause, and the Clerk of this Court is hereby authorized and directed to print the same, together with the stipulation of the parties with reference thereto, and attach the same to the printed transcript of record heretofore filed in said cause.

(Endorsed) Filed Dec 12 1904 Edward M. Holloway, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 46, inclusive, contain a true copy of the printed record filed in this court on the third day of December, 1904, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court and upon which the cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Erie & Western Transportation Company* v. *Erie Railroad Company,* No. 1137, October Term, 1904, as the same remains on the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-ninth day of September, A. D. 1905.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[SEAL]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States court-rooms, in the City of Chicago in said Seventh Circuit, on the fourth day of October, 1904, of the October term in the year of our Lord, one thousand nine hundred and four, and of our Independence the one hundred and twenty-ninth.

And afterwards, to-wit: On the twenty-second day of November, 1904, in the October term last aforesaid, came the appellant, by its counsel, Mr. Harvey D. Goulder, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904.

Erie and Western Transportation Company,
vs.
Erie Railroad Company,

The Clerk will enter my appearance as counsel for the appellant.

HARVEY D. GOULDER,
Cleveland, Ohio.

Endorsed: Filed November 22, 1904.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the thirtieth day of November, 1904, in the October term last aforesaid, came the appellee, by its counsel, Mr. C. E. Kremer and Mr. W. O. Johnson, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904.

Erie and Western Transportation Company,
Appellant,
vs.
Erie Railroad Company.

The Clerk will enter my appearance as counsel for the appellee.

C. E. KREMER,
W. O. JOHNSON.

Endorsed: Filed November 30, 1904.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the third day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 3, 1905.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge, presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

Erie and Western Transportation Company,
1137
vs.
Erie Railroad Company,

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 31, 1905.

And afterwards, to-wit: On the thirty-first day of January, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 31, 1905.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge, presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set for hearing on the third day of the April session of the October term, 1904.

And afterwards, to-wit: On the eleventh day of April, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 11, 1905.

Court met pursuant to adjournment.

Before:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing April 14, 1905.

And afterwards, to-wit: On the fourteenth day of April, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, April 14, 1905.

Court met pursuant to adjournment.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company,
1137
vs.
Erie Railroad Company,

} Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Harvey D. Goulder and Mr. Frank S. Masten, counsel for appellant, and by Mr. C. E. Kremer, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the first day of August, 1905, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above entitled cause, which opinion is in the words and figures following, to-wit:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 1137. October Term, 1904. April Session, 1905.

Erie & Western Transportation Company,
Appellant,
vs.
Erie Railroad Company.

} Appeal from the District Court of the United States for the Northern District of Illinois.

Before GROSSCUP, BAKER and SEAMAN, *Circuit Judges.*

This appeal is from a decree of the District Court, sitting in admiralty, in favor of the appellee, Erie Railroad Company, as libellant, for recovery of $28,815.00, against the steamer Conemaugh and the appellant Erie & Western Transportation Company, as claimant. The libel is in rem and propounds, in effect, that Erie Railroad Company is successor in interest to Union Steamboat Company, as owner of the propeller New York; that a collision occurred October 21, 1891, between the propellers New York and Conemaugh, resulting in the sinking of the Conemaugh; that proceedings thereupon arose in admiralty (which are detailed) wherein it was ultimately adjudicated that both vessels were at fault for the collision and each was liable for a moiety of the damages which ensued; that the final decree therein condemned the New York to pay the entire damage of the Conemaugh's cargo, without recoupment or allowance for one-half thereof chargeable to the Conemaugh, because no pleading was filed demanding such recoupment; that the libellant accordingly overpaid $19,734.61 which should have been borne by the Conemaugh and her owners, and was thus "relegated to its separate remedy against the Conemaugh"; and it is entitled to and prays recovery for such amount and interest thereon.

The prior proceedings in admiralty upon which the libel and decree rest the right of recovery are notable for their course and duration, and a summary is needful for understanding of the theory on which recovery was sought and allowed. As the appellant's brief well and concisely recites these facts (approved on behalf of the appellee as "substantially correct") such recital is incorporated in this statement, as follows:

"On the 21st day of October, 1891, a collision occurred in the Detroit River between the propellers New York, owned by the ap-

pellee's predecessor, the Union Steamboat Company, and the Conemaugh, owned by the appellant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.

"November 11, 1891, appellant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York, denying all liability, and attributing the disaster solely to the fault of the Conemaugh; also setting up the damage sustained by the New York as about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the physical damage to the New York, but no process was issued and [illegible]ree dismissing the cross libel was not appealed from by the U[illegible]mboat Company.

"On hearing [illegible]eamers were held at fault: 53 Fed. 553. Rehearing was had, resulting in the New York being held solely in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Insurance Company, and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the sole fault lay with the New York.

"On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of appellant for its own damage, and as trustee for the cargo damage, the decree providing, however, that the amount allowed for cargo insured by the intervening companies be paid to them.

"The owner of the New York appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh solely at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this appellant *in personam* for the New York's damage: 82 Fed. 819. Petition for re-hearing was denied.

"This appellant and the intervening insurers petitioned the Supreme Court for writ of *certiorari*. The petition was granted, and on hearing both vessels were held at fault: 176 U. S. 187.

"Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to the appellant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay the entire cargo damage. The insurers on cargo

which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67, was decreed to appellant as trustee.

"The owner of the New York then petitioned the Supreme Court for writ of mandamus, directed to the District Court for the Eastern District of Michigan, to require said Court to enter a decree which would divide the damage to cargo equally between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S. 317.

"Although the application to the Supreme Court was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The Supreme Court said among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was matter for appeal.

"Thereupon the owner of the New York appealed from the decree so entered. Appellant [here] moved dismissal of the appeal on the ground generally that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only in conformity with the mandate, and so was the decree of the Supreme Court. The motion to dismiss was denied: 104 Fed. 561.

"The appeal was then argued and the decree below affirmed: 108 Fed. 102.

"The Union Steamboat Company then (in its turn) petitioned the Supreme Court for a writ of *certiorari*, which was granted. The cause was again tried in the Supreme Court and the decree which had been entered by the District Court on its mandate was affirmed: 189 U. S. 363.

"While in the Supreme Court the last time the insurers who had covered that portion of the cargo for which this appellant had continued thereto as trustee, intervened.

"May 16, 1901, after dismissal of the petition for mandamus by the Supreme Court, the owner of the New York paid so much of the cargo damage as the decree required to be paid to the intervenors, and after the affirmance of the decree by the Supreme Court the remaining damage and costs were paid as provided by the decree, and the case closed."

Objections to the libel, for want of jurisdiction and of *res adjudicata*, were raised by exceptions, and renewed by the answer. The answer further sets up, by way of defense, the bill of lading under which the cargo of the Conemaugh was carried, which contained provisions (1) giving to the carrier the benefit of insur-

ance on the cargo—such insurance being effected and the loss paid to the shipper—and provided against liability therefor, unless (2) written claim was made within thirty days, and (3) action was brought for any loss within three months; and it is averred that no claim was so made or action brought.

No issues of fact arose, as a stipulation was filed which brought in the printed records in the prior proceedings as evidence, and admitted the averments of the answer respecting the terms of lading, fact of insurance and payment of loss to the shipper, and that no claim was made by shipper or insurer, or suit brought against the Conemaugh for the cargo loss, within the limitations of the bill of lading.

SEAMAN, *Circuit Judge,* delivered the opinion of the court.

When the present libel was filed, to enforce further contribution against the Conemaugh for damages which the New York was condemned to pay, the liability arising out of the collision had been in litigation between these steamers, with cargo representatives impleaded, for upwards of twelve years. The controversy was various in results during its progress and prolific in contributions to judicial reports, including three unanimous opinions respectively in the Circuit Court of Appeals and the Supreme Court in its course. It resulted in a final adjudication of mutual fault, awarding all damages arising out of the collision, with recovery against the New York alone for cargo damage and equal division of the aggregate of damages to the steamers; so that, on the face of this record, it would seem that no issuable liability between the steamers could have escaped judicial settlement. Nevertheless, a novel and interesting question is presented for review, without precedent for the relief sought by this libel, under analogous conditions; and the contention upheld by the decree is not without seeming force, under the general authorities cited and intimations in the opinions upon final appeal from the former decree.

Primarily, however, jurisdiction is challenged to entertain the libel, in any view, as a claim to enforce an assumed right of contribution arising out of the payment by the New York of the entire cargo damage when mutual fault was adjudged, and the admiralty cognizance of such subject matter for independent relief, must be ascertained before inquiry is open whether jurisdiction can be exercised or relief be extended in the case at bar.

1. The broad jurisdictional objection is thus stated in the brief on behalf of the appellants: "that the right of contribution when it exists cannot be asserted in the admiralty, either *in rem* or *in personam.*" Were the general proposition thus advanced an open question, and not clarified and ruled by the opinion of this court in *The Mariska,* 107 Fed. 989, 47 C. C. A. 115, its solution for the ob-

jects of the present case would not be free from difficulty in the light of the general authorities cited. But in that instance jurisdiction was upheld of an independent libel in rem, filed by the owners of the steamer Jay Gould against the Steamer Mariska, to enforce so called contribution for damages charged against and paid by the Jay Gould in a prior proceeding wherein the Jay Gould was the sole respondent, for the alleged mutual fault of that steamer and the Mariska in causing the collision. In effect, it was ruled that the contribution sought, which was the subject matter of the libel, was well recognized as a liability arising under the admiralty law, and as such was cognizable, not only as an incident to the primary cause for recovery of damages for the fault of both, but through an original libel to enforce the liability when not otherwise enforceable. This view we believe to be in harmony with the general line of American authorities, departing from the narrow interpretation which prevails in England and adopting that of the original admiralty jurisdiction, which was "interpreted by a more enlarged view of its essential nature and objects." *Insurance Co.* v. *Dunham*, 11 Wall. 1, 24. The case of the *Mariska* plainly authorizes admiralty cognizance of an independent libel for contribution; and this irrespective of the question whether the enforcement rests on the doctrine of subrogation to a lien in favor of the cargo, as there indicated, or upon the alleged liability to contribute by way of equalizing the burden for the fault and injuries, *vide The North Star*, 106 U. S. 17, 22.

In reference to the argument that rights resting on and merged in a decree are no longer maritime, in the jurisdictional sense, it may be observed that the rule is settled otherwise in early cases in admiralty (*Penhallow* v. *Doane's Admr.*, 3 Dall. 54, 86; *Jennings* v. *Carson*, 4 Cranch. 2, 21; *The Enterprise*, 2 Curt. 317, F. C. N. 4497; *The Centurion*, 1 Ware 490, F. C. No. 2554), though it well may be that such rule is applicable only to relief by way of enforcing the decree.

The general contention, that a libel for contribution cannot be entertained, is overruled.

2. The propositions on which the libel and decree rest are substantially these: That the maritime law creates an absolute liability against each of the contributors to a collision, mutually at fault, to bear an equal share of the resulting loss to vessels and cargo; that, because the New York was condemned in the prior litigation with the Conemaugh and the representatives of her cargo, among other liabilities, to pay the entire cargo damage, without recoupment or allowance for any share of such damage chargeable to the Conemaugh for her adjudged mutual fault—no pleading to that end having been filed by the New York—the fact of such adjudication and

of payment to the cargo representatives created *ipso jure* liability against the Conemaugh to reimburse one half of the amount so paid; and that, accordingly, exemption of the Conemaugh from liability to the cargo owners, under the bills of lading, furnishes no defense against such reimbursement by way of contribution. This contention assumes that the admiralty rule, that both vessels at fault for a collision must bear the damage in equal parts, creates distinct and absolute liability for each element of damage entering into the adjudication and payment; so that, failing such equal division of the cargo damage in the primary suit between the vessels, the charge to and payment by the New York alone raised an independent cause of action against the Conemaugh to pay one half the amount, though not obligated to the damnified cargo representatives for any part of such injury.

The theory on which *The Mariska* case *supra*, proceeded is thus adopted, in so far as it sanctions independent right of action for unquestionable contributory liability, but the further doctrine of that decision, that the right arises out of subrogation, is necessarily denied. Intimations of independent remedy to enforce contribution, in the event of actual liability of the Conemaugh for cargo damage, which appear in the opinions of the Circuit Court of Appeals, on final appeal of the New York in the primary suit (*The New York*, 108 Fed. 47, 102, 107, 47 C. C. A. 232), and of the Supreme Court, upon certiorari (*The Conemaugh*, 189 U. S. 363, 368), are assumed to sanction this theory and proceeding; although no sanction appears in either of these opinions for liability upon the part of the Conemaugh to cargo damage, if not liable to the cargo owners, and the opinion of the Circuit Court of Appeals clearly implies that the Conemaugh was not chargeable in such event. The extreme contention of absolute liability, however, notwithstanding both the failure to obtain division in the prior litigation and non-liability of the Conemaugh to the cargo representatives, is pressed in support of the present decree, and it is obvious that it can rest on no other ground.

As a general proposition of maritime law, with the effect of the adjudication left out of consideration, it is doubtless the doctrine of the cases referred to—*The North Star*, 103 U. S. 17, and the *Chattahoochie*, 173 U. S. 540—that the fact alone of non-liability of the Conemaugh to her cargo owners does not exonerate her from contributory liability to the New York, if the New York is, nevertheless, liable for such damages. Whether the doctrine of this line of authorities—which is peculiar to the maritime law and not of equitable origin—could be deemed applicable, as an original proposition, to the insurance provision in the instant bill of lading, either to charge the one steamer with full recovery in favor of the insurers,

or to enforce contribution against the other, is a question not arising upon this review, nor open to consideration, in our understanding of the effect of the proper adjudication, either in the admiralty or under the general law.

The general rule of admiralty, preserved from the ancient text of the law, is well settled in collision cases, that each vessel in fault is equally liable for injuries arising and must bear the damages equally, without reference to the degree of fault. *The North Star,* 106 U. S., 17, 20, and authorities reviewed. So, contrary to the rule at common law, one of the parties at fault can maintain a libel against the other for apportionment of the damage in conformity with such maritime rule. For cargo damage the parties injured may proceed against one offending vessel and obtain decree against it for the entire damage, unless the other, jointly liable, is brought into the proceeding; but when both are before the court the entire damages arising from the mutual fault are added together, and the amount is apportioned in equal parts to be borne equally by them. *The Atlas,* 93 U. S. 302, 313, 317. When liability against one is adjudicated without the presence of the other, the apportionment for mutual fault cannot be made, and the liability can then be apportioned in further proceedings as held in *The Mariska, supra.*

The rule, as defined under all the authorities referred to, plainly intends apportionment of the damages between the joint contributors at fault in a single adjudication. Thus in the instructive opinion of Mr. Justice Bradley, in *The North Star,* 106 U. S. 17, 20, 22, the distinguishing feature of the rule is pointed out, that the authorities recognize only an equal division of the aggregate joint damage and not a liability of one to the other for specific damages inflicted; that all concur in the view that "the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden." It was there held, accordingly, that the statutory limitation of liability on the part of one was not applicable until the aggregate of joint damage was ascertained, and then only "to avoid payment *pro tanto* of the balance found against such party." So in *The Chattahoochie,* 172 U. S. 540, 553, this language of the *North Star* case is adopted as equally applicable to cargo damage involved in the collision; and the provision known as the Harter act, touching cargo liability of the carrier, was held inapplicable until the aggregate injury was ascertained and apportioned under the rule. Of like effect is the case of *The George W. Roby,* 49 C. C. A. 481, 111 Fed. 601, 614.

The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining,

dividing and charging the liability between all parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were apportioned equally, the decree charges the cargo damages against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York, in the final hearing before the trial court and in both reviewing tribunals, upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here, for independent relief, upon averment that the burden of cargo damage was thus imposed for want of a pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed, touching all interests, with all damages apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively. These conclusions, thereupon, are unmistakably expressed in the opinions and carried out in the final decree: (1) That both steamers were at fault for the collision; (2) that the damages suffered by both steamers were ascertained, the aggregate sum divided and so charged in equal shares; (3) that the underwriters of the cargo, being innocent of the fault of either vessel, are entitled, as they insisted "to a recovery to the full amount of their damage against the New York, notwithstanding the Conemaugh may also be in fault for the collision"—175 U. S. 209—and this amount is ascertained and so charged; (4) that such provision in the decree conformed to the mandate of the Supreme Court, and if the trial court "erred in refusing to allow recoupment, the remedy is by appeal"—178 U. S. 320; and finally, in effect, (5) that division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon "of liability of the Conemaugh to her cargo underwriters" it could not be "summarily assumed that because she was found in fault, and liable to the New York for one half of her damages, she is also liable to the underwriters upon her cargo," and thus foreclose defense under the "special stipulations in her bills of lading," which are asserted on behalf of the Conemaugh as written therein "to set up against the claims of the underwriters." *The New York*, 108 Fed. 102; 47 C. C. A. 232; affirmed in *The Conemaugh*, 189 U. S. 363.

The adjudication of liabilities arising out of the collision and apportionment thereof, which thus appear is, as we believe, the proceeding in admiralty contemplated by the rule (as defined in *The North Star, supra,* and *The Chattahoochie, supra*), for all cases

of maritime collision. It is unquestionably *res judicata* upon all matters involved in that contest. The right of the underwriters to recover the entire cargo damage against The New York, irrespective of fault on the part of The Conemaugh, is there settled. However questionable it may appear, whether such amount was justly recoverable in view of the provision now disclosed in the bill of lading, giving the Conemaugh the benefit of insurance on her cargo—that is, whether the introduction of such contract would not have served as a defense, in whole or in part, when the Conemaugh was found in fault, on the authority of *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.* 117 U. S. 312, 324, 325 and other cases—nevertheless full recovery was awarded and is now incontestible.

We are of opinion that such adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms; although it may extend to the enforcement of contribution against one not involved in such decree, for recognized joint liability within its contemplation.

The remark in the final opinion of the Supreme Court (*The Conemaugh*, 189 U. S. 363, 367), in reference to the modification of the decree there sought, if applicable to the like contention for review, is decisive of the present libel, namely: "The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done." The present decree, in effect, not only accomplishes the modification of the former decree, which was thus refused by both appellate tribunals, but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely, if the appellate jurisdiction is inadequate for such object, it is not within the coordinate jurisdiction of another court, sitting in admiralty, to grant relief from the terms of the prior decree, or to reopen the controversy.

Assuming for the inquiry (with no intimation of such conclusion from the facts) that equities appear in any phase of the case, for charging either the owners of the Conemaugh or the underwriters with a share of the liability thus imposed upon the New York, the equities so assumed arise out of the conduct and results of the litigation in reference to such claim of cargo damage, and not out of the collision, and so treated are not cognizable in admiralty, apart from a primary cause to establish the respective rights and liabilities of the parties concerned. Courts of admiralty are not vested with the powers of a court of equity, though equitable principles

are observed and equities recognized, when the primary cause is within their limited jurisdiction. *The Eclipse,* 135 U. S. 599, 608, and cases cited. If the supposed right to enforce contribution exists the way is not afforded in the admiralty forum.

In no aspect of the case, therefore, can we discover ground for the exercise of jurisdiction in the admiralty to intervene for the relief granted by the decree from which this appeal is brought, or for any form of relief under the circumstances stated in the libel. Accordingly, the decree of the District Court is reversed, with direction to dismiss the libel, as not stating a case for relief in the admiralty.

And afterwards, to-wit: On the first day of August, 1905, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, August 1, 1905.

Court met pursuant to adjournment.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

Erie and Western Transportation Company, 1137 *vs.* Erie Railroad Company.	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said district court with direction to dismiss the libel as not stating a case for relief in admiralty.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 15, inclusive, contain a true copy of the papers filed (except briefs of counsel) and proceedings had thereon, in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Erie and Western Transportation Company v. Erie Railroad Company, No. 1137, October Term, 1904, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at City of Chicago, this twenty-ninth day of September, A. D. 1905.

[UNITED STATES CIRCUIT COURT OF APPEALS. SEVENTH CIRCUIT.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh District.

64 United States Circuit Court of Appeals for the Seventh Circuit.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit to Bring Before the Supreme Court the Case of

THE ERIE RAILROAD COMPANY
vs.
THE PROPELLER CONEMAUGH, ERIE & WESTERN TRANSPORTATION COMPANY, Claimant.

It is stipulated and agreed by and between the parties hereto, by their respective proctors, that the certified copy of the transcript of record in this cause, filed by the Clerk of this Court, and now on file in the office of the Clerk of the Supreme Court of the United States, in an application therein made for a writ of certiorari in this cause, entitled Erie Railroad Company *vs.* Propeller Conemaugh, number 433 of the October term, 1905, shall be taken as a return to the writ of certiorari granted and issued by the Supreme Court of the United States on the 31st day of October, 1905.

C. E. KREMER,
W. O. JOHNSON,
Pr. Libellant.
HARVEY D. GOULDER,
Proctor for Defendant.

Endorsed: 1137. U. S. Circuit — of Appeals. Erie R. R. Co. *vs.* Prop. Connemaugh. Stipulation. Filed Nov. 14, 1905. Edward M. Holloway, Clerk. C. E. Kremer, W. O. Johnson, for Libellant.

65 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erie & Western Transportation Company is appellant and Erie Railroad Company is appellee, No. 1137, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the

said Circuit Court of Appeals and removed into the Supreme
66 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of October, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

67 [Endorsed:] File No. 19,935. Supreme Court of the United States. No. 433, October Term, 1905. Erie Railroad Co., *vs.* Erie & Western Transportation Co. Writ of certiorari. Filed Nov. 14 1905 Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Erie and Western Transportation Company, appellant, *vs.* Erie Railroad Company, appellee, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of November, A. D. 1905.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

68 [Endorsed:] File No. 19,935. Supreme Court U. S. October Term, 1905. Term No. 433. Erie Railroad Co., petitioner, *vs.* Erie and Western Transportation Co. Writ of certiorari and return. Filed Nov. 17, 1905.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. McKENNEY,
Clerk

No. [redacted]134

IN THE

SUPREME COURT OF THE UNITED STATES

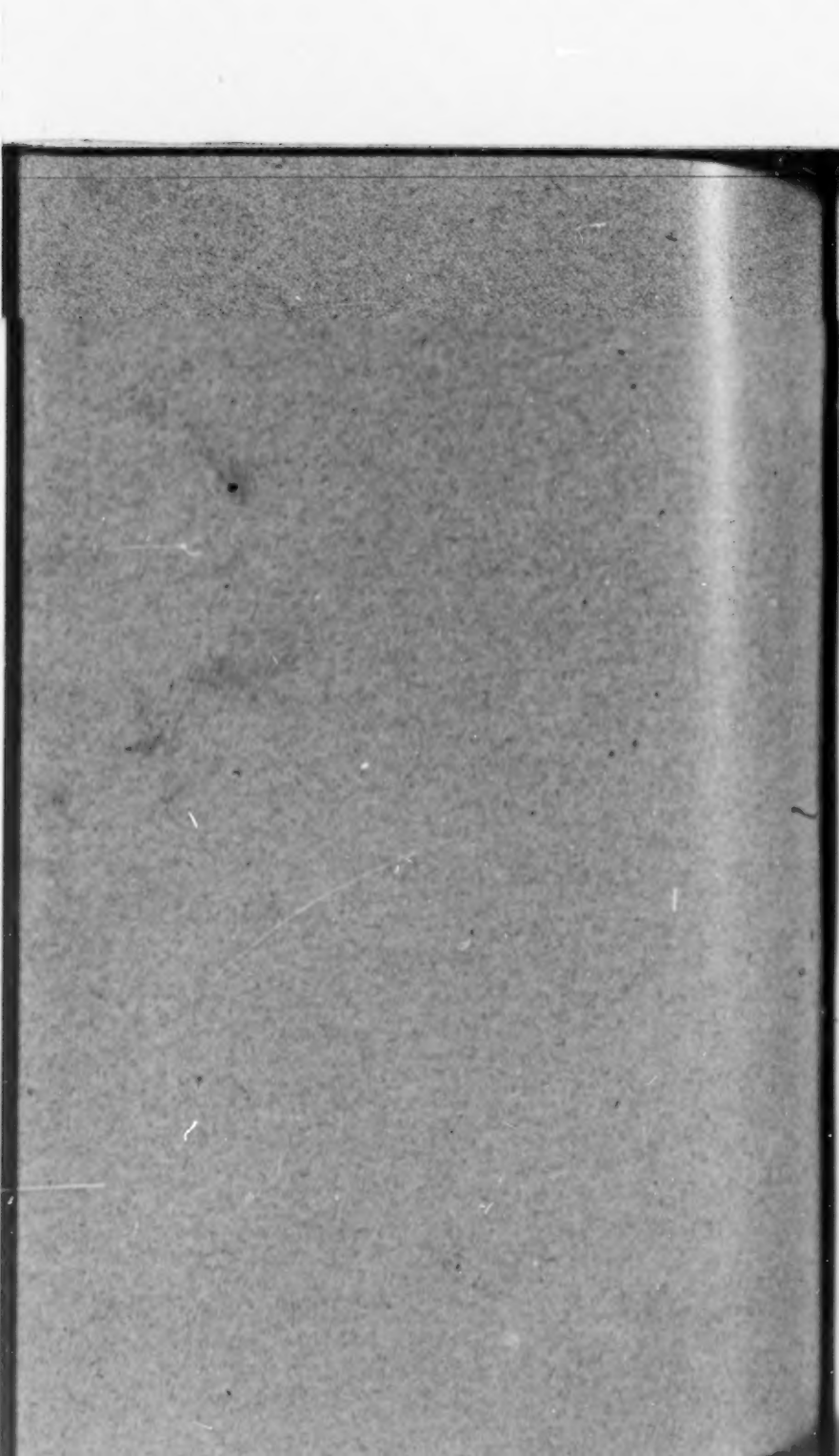
OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO



IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to bring before the Supreme Court the case of the Erie Railroad Company against the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

To the Honorable Judges of the Supreme Court of the United States:

The petitioner respectfully shows to this court:

First—That your petitioner is a corporation and on the 30th day of June, 1896, it merged the Union Steamboat Company in with it by virtue of the laws of New York, and thereby acquired and became possessed of all the estate, property, rights, privileges and franchises of the said Union Steamboat Company in substantially the same manner as the same were held by the latter, and by virtue of such merger it became entitled to collect and claim all debts and claims due the said Union Steamboat Company from any person or party.

Second—That this case grows out of a collision which occurred on the 21st day of October, 1891, between the Propeller New York, then owned by the Union Steamboat

Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

Third—That on the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of said collision.

Fourth—The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

Fifth—A trial was had in the District Court and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

Sixth—This decision was, on petition for re-hearing, reversed and the New York was held solely at fault.

Seventh—That thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	8,553.06
Marine Insurance Company	916.57
	$19,841.56

Eighth—To all of the petitions of the above intervenors the Union Steamboat filed its answer, denying all liability

for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

Ninth—The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

Tenth—A petition for a writ of certiorari was then filed and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Eleventh—In obedience to the mandate issued after this decision the District Court entered a decree which held the New York liable *for all of the cargo damage* and one-half of the damage sustained by the Conemaugh.

Twelfth—A petition was then filed by the owner of the New York, in this court, praying for a writ of mandamus, to issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued and after a hearing this court denied the writ and held that if the owner of the Conemaugh felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thirteenth—Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Fourteenth—Thereupon the case came up for a hearing on the merits and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Fifteenth—Thereupon a petition for a *writ of certiorari* was filed in this court. This was granted, and the case came up for a hearing, and in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. Co. v. *E. & W. Trans. Co.*, 189 U. S., 363.

Sixteenth—The court thereupon issued its mandate and the petitioner was compelled to pay, and did pay, the decree in which the owner of the New York was compelled to pay *all of the* cargo damage.

Seventeenth—Thereupon this petitioner filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

Eighteenth—An appeal was taken and hearing had in the United States Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

Nineteenth—The pleadings in the District Court were

the libel, answer, and agreed state of facts. Petitioner alleges that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in holding, as follows:

> (5) "That division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *
>
> "We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms." Thereby misconstruing the opinion of this court in *New York*, 178 U. S., 317.

The concluding words of which are as follows:

> "But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The court erred in holding as follows:

> "Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty; with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in 189 U. S. 366, which is as follows:

> "The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of U. S. Circuit Court of Appeals in 108 Fed. Rep., 47, which is as follows:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in this

case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again on page 107 the courts say:

"The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

3d. In holding that the libelant has had its day in court, and has been heard to ask the contribution now demanded in the libel, and that the trial court, the Court of Appeals, and this court has denied such right, and that therefore no independent proceeding can be brought in admiralty to recover contribution, all of which is contrary to the fact as it appears from the decisions of the Court of Appeals and this court, as found in the opinions reported in the cases: 108 Fed. Rep., 47; 178 U. S., 317, and 189 U. S., 363.

4th. Petitioner further alleges that this court, having held that the right of contribution by way of recoupment had not been prayed for by separate pleadings, therefore the owners of the New York could not be heard upon this question, and that the question of whether there should be contribution or not between the New York and Conemaugh as to the cargo damage was not passed upon by it, and was therefore still open and undetermined, and could therefore be made the subject of a separate suit either in admiralty or equity.

5th. That the decision of the Court of Appeals deprives the libelant of its right to recover contribution in a case of collision in which both the New York and Conemaugh have been held at fault, and under the law and practice in admiralty each should bear and pay one-half of the total damages, when such right is not barred or the amount of recovery reduced by any contract or statute or limitations.

That the decision of the Court of Appeals is contrary to law, as petitioner is informed, and deprives the libelant of its day in court, and its right to be heard upon its claim against the Conemaugh for one-half of the damages to her cargo which the New York was compelled to pay, and which the Conemaugh, under the law and practice, should bear and pay.

Wherefore your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this honorable court for such proceedings as shall seem just.

Erie Railroad Compa
by James P. Sher
General Agen

B. Kremer

Johnson

Proctors for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

James P. Sherwin being duly sworn, deposes and says that he is the agent of the petitioner herein, the Erie Railroad Company; that said petitioner is a corporation; that deponent has read the foregoing petition; that the allegations therein contained are true, of his own knowledge, except as to the matters and things therein stated upon information and belief and as to those matters he believes it to be true, because he has been more or less familiar with the various steps taken in the litigation referred to in the said petition.

James P. Sherwin

Subscribed and sworn to before me this 11th day of October, A. D. 1905.

Walter M. Johnson
Notary Public

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be allowed.

D. J. Schuyler

C. W. Greenfield

FILE COPY.

No. [redacted]134

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. KIRKPATRICK, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

Brief in Support of Petition.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Seventh Circuit to bring before the Supreme Court the case of the Erie Railroad Company vs. the Propeller Conemaugh, Erie & Western Transportation Company, claimant.

BRIEF FOR PETITIONER.

This case arises out of a collision between the Steamer Conemaugh and the Propeller New York, decided by this court.

The New York, 175 U. S., 187.

The court held both steamers at fault and decided that the New York must pay the damages sustained by the owners and insurers of the Conemaugh's cargo.

The case again came before the court upon an order to show cause, directed to the judge of the District Court, who entered a decree under the mandate.

Ex parte Union Steamboat Co., 178 U. S., 317.

In this decision the court held that the question of recoupment not having been decided by it at the former hearing, could not be brought to the attention of this court by a

petition for a writ of mandamus, but must go, if the party feels itself aggrieved, by appeal to the United States Circuit Court of Appeals. Thereupon the Circuit Court of Appeals heard the case on appeal, and decided that the question of the right of the New York to recoup one-half of the cargo damages against the Conemaugh was not at issue before it, because the pleadings praying such recoupment had not been filed, and also holding that the right to recover the moiety of the cargo damage could be made the subject of an independent separate suit. The owner of the New York thereupon petitioned for a writ of certiorari, which was granted, and this court again heard the case,

The U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363,

and again held affirming the decision of the Circuit Court of Appeals as we construe it, *that the owners of the New York had a right, by an independent suit, to recover the moiety of the cargo damage of the Conemaugh or her owners.*

Thereupon a libel was filed in the United States District Court for the Northern District of Illinois by the Erie Railroad Company, owner of the Propeller New York, against the Steamer Conemaugh to recover from it the sum of $19,734.61 with interest, this being one-half of the damages paid by the owner of the New York to the shippers and insurers of the cargo of the Conemaugh.

The District Court entered a decree for the libelant which the Circuit Court of Appeals for the Seventh Circuit Court reversed; holding that there was jurisdiction in admiralty of a libel for contribution, but that the question of whether there should be contribution or not was *res adjudicata* by virtue of the decisions of this court, above referred to.

We contend that the Circuit Court of Appeals misconstrued the decisions of this court in that regard, and that the

right of the New York to recover contribution by separate and independent suit has not been decided by this court or the Circuit Court of Appeals for the Sixth Circuit.

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * *

> The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, or that this court held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide and did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.
North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit the rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, setoff or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell*, 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexandre*, 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrongdoers, when these were the libelant and defendant then before the court.

The District Court, however, held in this case that it could not be done without a cross libel or petition—the Cir-